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Supreme Court of the United States.

OCTOBER TERM, 1946.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, *Petitioners,*

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Protective Committee for Bonds of Old Colony Railroad Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on January 13, 1947, in the form of an Order for Mandate pursuant to opinions of the majority of said

Court rendered January 13, 1947, affirming Orders of the United States District Court for the District of Connecticut, approving and confirming a plan of reorganization of the New York, New Haven & Hartford Railroad Company, debtor, and Old Colony Railroad Company, and others, secondary debtors, under Section 77 of the Bankruptcy Act (11 U.S.C. § 205).

Opinions Below.

The Memorandum of Decision of the District Court is unreported, but may be found in the record (p. 11891). The opinions of the majority of the Circuit Court of Appeals, rendered January 13, 1947, are not yet reported but are printed in full in Stipulation Volume I (filed herewith), Nos. 15 and 17, pp. 12655 and 12765. (*See Note below.*) A prior decision of the Circuit Court of Appeals, which is relevant to the questions herein in some respects, is reported in 147 F. 2d, 40 (January 2, 1945).

NOTE on the Record and references thereto:

The record for this proceeding is based on stipulation (Stip. R. II, No. 35; *see also* Nos. 33 and 34) of the parties to the proceedings in the Circuit Court of Appeals below (except parties appellant not seeking certiorari), and consists in substance of the following:

(1) *Stipulation Volumes I* and *II*, containing opinions, reports and other basic documents newly assembled from the I.C.C., District Court and Circuit Court of Appeals record of the proceedings in the matter of the reorganization of New York, New Haven & Hartford Railroad Company and Old Colony Railroad Company, and bound for the convenience of this Court, as stipulated for the purposes of this Petition and of the petition of the Institutional Group for Boston Terminal Company bonds to be filed with this Court.

(2) *C.C.A. Record* for this proceeding in Circuit Court of Appeals for the Second Circuit, F. 2d, (decided January 13, 1947), as certified by the Clerk of said Court.

(3) *Prior Supreme Court Record*, filed in connection with *Massachusetts* v. *New York, New Haven & Hartford Railroad Com-*

Jurisdiction.

The Circuit Court of Appeals entered judgment on January 13, 1947, pursuant to majority opinions rendered January 13, 1947, and its Order for Mandate was entered on February 4, 1947, after denial on February 1, 1947, of your petitioners' petition for rehearing. The time for filing petitions for certiorari in the above-entitled cause was extended to and including May 15, 1947, by order of a justice of this Court dated April 1, 1947. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938), 28 U.S.C. § 347(a), and under Section 24(c) of the Bankruptcy Act (11 U.S.C. § 47(c)).

Statute Involved.

The statute involved is Section 77 of the Bankruptcy Act (11 U.S.C. § 205).

Statement of Matter Involved.

This petition seeks a review by this Court, *for the first time in this proceeding*, of a plan of reorganization for

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pany; cert. denied, 325 U.S. 884, 89 L. ed. 1999 (June 18, 1945).

(Reference may also be made to the printed record in the reorganization proceedings of the District Court for the District of Connecticut.)

References in this Petition, and in your petitioners' Brief in support, will use abbreviated designations of the parts of the record referred to, as follows:

Stipulation volumes	**Stip. R.**
C.C.A. Record from Court below	**C.C.A. R.**
Prior Supreme Court Record	**Prior S.C. R.**
District Court Record, generally	**D. R.**

Parts referred to will be more specifically designated by volume numbers (A, B, or I, II, etc.) and Exhibit numbers, as appropriate, and by page numbers used in such volumes or Exhibits.

Old Colony Railroad Company, secondary debtor in proceedings under Section 77 of the Bankruptcy Act for reorganization of the New York, New Haven & Hartford Railroad Company. *Since* the Old Colony properties had been under long term lease to the New Haven, and the lease was disaffirmed by the New Haven trustees in 1936; *since* the Old Colony thereafter became a secondary debtor in the proceedings for the reorganization of the New Haven; *since* the railroad properties of Old Colony have, during the pendency of these proceedings, been operated by the trustees of the New Haven *"for the account of Old Colony"* under court order, such operations resulting in a prior lien claim against Old Colony in the estimated amount of $10,500,000; *since* Old Colony's unsecured claim against New Haven for rejection of the lease has been adjudicated at $47,000,000; *since* the non-operating or non-railroad properties of Old Colony bulk extraordinarily large in the value of its total assets, determined on any basis; *since* the comprehensive plan relating to Old Colony, debtor, contemplates a *sale* of its properties to the reorganized New Haven; *since* the Old Colony bondholders, the only class of creditors voting as creditors of Old Colony upon the comprehensive plan, in a representative vote rejected the present plan; *since* the Circuit Court of Appeals has once ordered the present plan for Old Colony to be remanded to the Interstate Commerce Commission as being a product of purported compromise and not founded upon an exercise by the Commission of its independent judgment in the premises; *and since* the plan specifically authorizes the District Court to eliminate from the comprehensive plan all provisions for reorganization of Old Colony, if the Court considers that opposition by the Old Colony interests will unduly delay the reorganization of New Haven—numerous questions of law relating to the methods and principles of valuation and administrative

procedure under, as well as the application of the "cram-down" provisions of, Section 77 are raised by this petition, which have not heretofore been passed upon by this Court, but which should be settled by it.

The following comprehensive statement of facts is necessary to an understanding and appraisal of these questions. The questions presented appear at page 30 *et seq.* below.

The Course of the Proceedings.

On October 23, 1935, the New Haven filed its petition in the United States District Court for the District of Connecticut seeking reorganization under and pursuant to the provisions of Section 77 of the Bankruptcy Act, which petition was duly allowed, and trustees were appointed to administer the New Haven estate. On June 2, 1936, the New Haven trustees disaffirmed [1] as burdensome the New Haven's 99-year lease of the Old Colony properties entered into in 1893, and on June 3, 1936, as then owner of a majority of the common stock of Old Colony (which stock has since been declared valueless), caused Old Colony to file, in the same District Court and in the same proceedings as those of the principal debtor, a petition for reorganization, stating, in conformity with the provisions of Section 77 (b), that Old Colony desired to be reorganized "in connection with or as a part of the plan of reorganization" of the principal debtor. This petition was likewise approved [2] as properly filed and, over the objections of numerous parties in interest, the individual trustees of the principal debtor were appointed trustees of the Old Colony estate

[1] *See* Prior S.C. R., vol. B, Ex. 33, p. 721 (text of lease, D. R. 737).
[2] Prior S.C. R., vol. B, Ex. 34, p. 731; Ex. 35, p. 747; and Ex. 36, p. 817.

also, in spite of the obvious fact that the interests of the two roads upon disaffirmance of the lease became thenceforth adverse.

Since the Old Colony, as a result of its long operation by the New Haven, had neither operating equipment nor personnel nor funds sufficient to conduct independent operation, the trustees of the principal debtor were ordered[3] to operate the Old Colony lines *"for the account of Old Colony"* and accorded a lien on all its assets, prior to the lien of the Old Colony bonds, to secure it against any losses that might be incurred as a result of such operation. This operation has been described by this Court as an "involuntary" operation conducted solely for public convenience. See *Palmer* v. *Webster & Atlas National Bank of Boston,* 312 U.S. 156. (The New Haven trustees' claim for such losses, and for taxes, Boston Terminal charges and administration expenses allocated to Old Colony is hereinafter referred to as the *"prior lien claim."*)

Thereafter a Segregation Formula was promulgated providing for an allocation of charges and earnings to and among the various divisions and leased and former leased lines that comprised the New Haven system. It did not undertake, however, to determine the manner in which the respective properties should be operated, such operations being left presumably to the discretion of the New Haven trustees appointed by the Court. It is significant, however, that the properties of Old Colony have in fact been operated on a system basis in spite of the order that they be operated "for the account of Old Colony," a factor contributing to Old Colony's alleged recurrent losses.[4]

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[3] Prior S.C. R., vol. B, Ex. 36, pp. 817, 819. *See* Bankruptcy Act, Section 77(c)(6).

[4] See Report of Victor V. Boatner, dated February 15, 1946, filed as Appendix A to the Report of the Special Commission to Investigate the Railroad Transportation Facilities Within the Com-

It was not until March 22, 1940, that the Commission certified, in its Original Report,[5] a plan of reorganization for the principal debtor involved in this proceeding, and that plan contained *no* provisions whatsoever with respect to Old Colony, it being the then view of the Commission that Old Colony's operating losses and the prospects for continued operating losses rendered it undesirable and impractical, if not impossible, to propose any plan for Old Colony at that time.[6] However, on February 18, 1941, over four and a half years after the filing of the Old Colony petition, and after certain savings and economies in the operation of the Old Colony properties had been effected or projected, the Interstate Commerce Commission certified to the Court its (First) Supplemental Report and Order,[7] proposing for the first time a plan for Old Colony.

This plan provided in substance for the purchase by the New Haven of all the Old Colony properties, franchises and assets at a price which, after satisfaction of the prior lien claim, would net the Old Colony bondholders $16,448,000 face amount of the securities of the reorganized New Haven, an award equal to the principal amount of Old Colony bonds then and now outstanding.[8] In this Re-

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monwealth of Massachusetts (Massachusetts General Court, 1946, House Doc. 2119).

[5] 239 I.C.C. 337 (1940), Prior S.C. R., vol. A, Ex. 1, p. 7863.

[6] As of December 21, 1937, the prior lien claim of the New Haven trustees against Old Colony for operating losses was adjudicated at some $11,000,000, including over $3,000,000 of losses from their operation of the properties of the Boston & Providence Railroad—a leased line of the Old Colony, which lease was subsequently disaffirmed by the trustees of New Haven in their capacity as trustees of Old Colony

[7] 244 I.C.C. 239 (1941), Prior S.C. R., vol. A, Ex. 2, p. 8037.

[8] The total claim of the bonds of Old Colony, as of December 31, 1943, the "cut off" date for Old Colony, principal and interest, amounted to some $21,612,000. The "cut off" date for the principal debtor's plan is June 30, 1943.

port the Commission reviewed in detail and at length the circumstances giving rise to this determination of value and price.

On June 3, 1941, hearings were held before the District Court on this plan, at which numerous parties objected to the treatment accorded the Old Colony bondholders as grossly excessive. Following argument, the Court suggested "the formation of an informal committee to explore the possibilities of progress by compromise rather than multiparty litigation"[9] and to "formulate a compromise of the conflicting views concerning the terms of the plan dealing with Old Colony Railroad."[10] Such a committee was thereupon appointed and proceeded to its task. Thus, within slightly more than four months of the time when the Commission first certified a plan for Old Colony, the Court had diverted the proceedings into the channels of "compromise" and at the same time thereby indicated its future disapproval of that plan.

Following this June 3d hearing and the significant appointment of the compromise committee, your petitioners, at the present moment representing upwards of $4,000,000 face amount of bonds, organized "for the purpose of protecting the rights of such holders of bonds of Old Colony Railroad Company . . . as might file authorizations with it," and upon petition to the Court were admitted as a party intervenor to these proceedings on July 24, 1941.[11]

On September 19, 1941, the compromise committee filed its Report[12] with the District Court, stating that it had "endeavored to formulate proposals which would compromise the conflicting views [relative to Old Colony] on a give and take basis." *The committee, however, did not un-*

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[9] Prior S.C. R., vol. A, Ex. 6, pp. 8922a, 8958.
[10] *Op. cit.*, 9013.
[11] Prior S.C. R., vol. B, Ex. 105, p. 8675, and Ex. 106, p. 8679.
[12] Prior S.C. R., vol. A, Ex. 6, pp. 8922a, 9013-9031.

dertake to determine the price which the New Haven should pay for the Old Colony properties, confining itself to the development of the fundamentals of a plan of reorganization, more particularly provisions which, if the New Haven should purchase the Old Colony properties, would insulate *it* against losses that might be occasioned from passenger operations on the Old Colony lines and from obligations to Boston Terminal Company, owner of South Station, Boston.[13]

On December 8, 1941, the Court rendered its Opinion on Plan,[14] disapproving the same and condemning the value of the Old Colony properties determined by the Commission as excessive for properties "productive of nothing but losses." The Court held that, as to the reorganization of Old Colony, "the best prospect of prompt progress appears to be by reasonable compromise" and commended the compromise committee's report to the parties and the Commission, appending it to its opinion as Exhibit A.[15]

Thereafter, on January 27, 1942, the Commission issued its Notice of Hearing to be held at Brooklyn, New York, on February 17, 1942, for the purpose, among others, of receiving evidence relative to Old Colony. At the time of this hearing no plan relative to Old Colony (other than the disapproved plan) was before the Commission, unless it was contained in the compromise committee report. This report, however, did not set a value on the Old Colony assets or a price to be paid therefor to Old Colony or its bondholders. *This is the last hearing ever held by the Commission in these proceedings,* and a reading of the record [16] of this hearing will show that no evidence was there intro-

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[13] *Op. cit.*, 9014.
[14] *Op. cit.*, 8922a.
[15] *Op. cit.*, 9013.
[16] C.C.A. R., I.C.C. *in matter of* the N.Y., N.H. & H. R. Co., Debtor, Fin. Docket No. 10992, February 17-20, 1942.

duced which would serve in any way to support a reduction by the Commission of the value of the Old Colony properties as determined by it in its (First) Supplemental Report and Order of February 18, 1941. The only evidence bearing on value introduced at that hearing, in addition to the testimony of a single witness as to the probable market or cash value of the proposed new New Haven securities, was in reference to the possibility of providing the New Haven, if it should acquire the Old Colony properties, with a means of *escape* from the losses which it was contemplated would result from Old Colony's passenger traffic and its share of the Boston Terminal expenses, such escape provisions being calculated to *enhance* rather than detract from the value of the Old Colony properties.[17]

At the beginning of this hearing it was represented to the Commission that it would be impractical for the compromise committee to negotiate further without some "assurance that their labor would prove fruitful,"[18] and that the Court had stated its confidence that, if "official encouragement and approval" should be forthcoming, progress could be made toward a fair purchase price. Thereupon "at the conclusion" of the hearing (February 20, 1942) it was ruled that the record should be kept open until April 4, 1942, to permit the filing of a report which would propose a solution of the Old Colony problems.

On April 4, 1942, the so-called Joint Report[19] was filed with the Commission. It recites that "the proposals contained in the original Report of the Compromise Committee are, with but little modification, reaffirmed in all re-

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[17] These provisions have since received the approval of the Courts. 147 F. 2d, 40; *cert. denied*, 325 U.S. 884, 89 L. ed. 1999.

[18] Stip. R. II, No. 36, p. 134. *See also* Third Supplemental Report of Commission, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9761.

[19] Stip. R. II, No. 36, p. 133.

spects by this Joint Report . . ." and it is further stated that [20]—

> "Faced with the problem of reaching an agreement as to *price* pursuant to the aforesaid ruling, the Committee decided that representatives of the two Groups of security holders having conflicting views as to Old Colony and of the principal Debtor were better qualified to negotiate *price* than were the members of the Committee. Accordingly, negotiations were had between a representative of the Insurance Group, a representative of the Mutual Savings Bank Group owning a substantial portion of Old Colony First Mortgage Bonds,[21] and counsel for the principal Debtor. This Report embodies the results of such negotiations." (Emphasis supplied.)

The three "negotiators," all of them interested primarily or exclusively in the New Haven and but secondarily or not at all in Old Colony, proposed a purchase price for the Old Colony properties which, after satisfaction of the prior lien claim of the New Haven trustees, taken at $10,500,000, would net the Old Colony bondholders $5,756,800 face amount of securities of the reorganized New Haven, an amount of securities some $10,691,200 less than that proposed by the Commission in its (First) Supplemental Report and Order of February 18, 1941.

The Joint Report thus prepared was never submitted to your petitioners for their consideration or approval, nor

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[20] Stip. R. II, No. 36, p. 135.

[21] The Joint Report failed to state that this Group also owned over $30,000,000 of *New Haven* bonds. Since the filing of the Joint Report, this Group has reduced its Old Colony holdings to less than $1,000,000 face amount of bonds. Neither the Insurance Group nor the principal debtor has ever purported to represent Old Colony interests.

were any of the parties to the proceeding ever accorded an opportunity to offer evidence, examine or cross-examine witnesses or argue orally with respect to the plan and the price fixed by the Joint Report. They were permitted to file briefs only.

On October 6, 1942, the Interstate Commerce Commission certified to the Court its Third Supplemental Report and Order,[22] which, as to those provisions relating to the Old Colony purchase price,[23] is substantially a *verbatim* copy of the Joint Report. The Commission concluded the Old Colony section of its Report as follows:[24]

> "In its decision disapproving the plan approved by us in our report of February 18, 1941, *supra*, the court in commenting upon the difficulty of fairly determining the value of the Old Colony properties, and the consideration which the principal debtor should *pay* for such properties, in accordance with the standards set in *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, expressed the opinion that the best prospects of a prompt and fair reorganization of the Old Colony would seem to lie in a compromise by the interested parties.
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> "As seen herein, the principal debtor and its major secured creditors, the Old Colony and the mutual savings bank group, the latter holding more than one-half of the bonds of the Old Colony, and a representative of the public, an assistant attorney general of the Commonwealth of Massachusetts (it was understood that any agreement of the Assistant Attorney General would not be binding on the Commonwealth), have agreed upon a *compromise purchase price*. The basis

[22] 254 I.C.C. 63 (1942), Prior S.C. R., vol. A, Ex. 8, p. 9753.
[23] *Op. cit.*, 89-94, Prior S.C. R., vol. A, Ex. 8, pp. 9780, 9789-9794.
[24] *Op. cit.*, 96, Prior S.C. R., vol. A, Ex. 8, p. 9797.

of the compromise has been fully explained. The desirability in some situations, of a compromise has been stated by the Supreme Court in *Case et al. vs. Los Angeles Lumber Products Co., Ltd. 308 U.S. 106.* While the *agreed purchase price* is smaller in amount than that which we formerly determined, upon further consideration, we find that the *purchase price* proposed in the joint report is fair and equitable, and in our opinion, conforms to the principles which the court in its opinion indicated governed, and we will modify the plan accordingly." (Emphasis supplied.)

Within sixty days of the filing of the Third Supplemental Report and Order of the Commission, dated October 6, 1942, certain parties to the proceedings filed petitions for modification of or for further hearing and argument on the plan of reorganization. All such petitions were denied and the Commission on July 13, 1943, certified to the Court its Fourth Supplemental Report and Order,[25] which modified the comprehensive plan in certain respects, but did not affect the price for the Old Colony properties provided in the plan. In discussing a proposal of the Commonwealth of Massachusetts relative to Old Colony, the Commission said:[26]

"It is likewise clear that to modify materially the provisions of the Joint Report in respect to the Old Colony would be to nullify the compromise reached after extended negotiations with little or no expectations that the suggested modification would prove acceptable to the interested parties. The result again would be a further delay in the consummation of the reorganization of the principal debtor and the Old Colony."

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[25] 254 I.C.C. 405 (1943), Prior S.C. R., vol. A, Ex. 9, p. 10123.
[26] *Op. cit.*, 422, Prior S.C. R., vol. A, Ex. 9, pp. 10155-10156.

On December 21, 1943, the District Judge, after hearing objections to the plan, entered his Opinion on Plan [27] in which he stated certain corrections which, in his judgment, should be made in the plan, including a modification or correction of the Old Colony purchase price to recognize in part the actual earnings of Old Colony for the years 1942 and 1943 in excess of the estimates for those years used by the parties negotiating the Old Colony purchase price. The District Court considered it had authority to order such corrections, but intimated that it would welcome a further report by the Commission, on its own motion, covering the suggested modifications.

However, the District Court entered no order at that time approving or disapproving the plan. Instead, and without returning the proceedings to the Commission, it accepted the Fifth Supplemental Report and Order made by the Commission "of its own motion," upon the "invitation of the Court" and without notice or hearing.[28] This Report, in addition to embodying the suggestions of the Court with respect to a modification upwards of the purchase price for the Old Colony properties, added to the plan the following new provision, referred to as section U (3), which provides: [29]

> "(3) That, should the judge determine, after due notice and hearing, that the provisions of this plan in respect to the reorganization of Old Colony are, because of opposition of other than New Haven parties or interests, such as to delay unreasonably and unnecessarily the reorganization of the principal debtor, he may in his discretion, set such provisions aside and consider and act upon the plan for reorganization of

[27] 54 F. Supp. 595 (1943), Prior S.C. R., vol. A, Ex. 12, p. 10695.
[28] 257 I.C.C. 9 (1944), Stip. R. I, No. 1, p. 10831.
[29] *Op. cit.*, 58; Stip. R. I, No. 1, p. 10922.

the principal debtor and the secondary debtors other than Old Colony."

On March 6, 1944, after hearing objections to the plan as thus modified and contained in the Fifth Supplemental Report, the District Court rendered its opinion [30] approving the plan and entered its decree in accordance therewith, Order No. 734.[31]

Thereupon your petitioners, among others, filed their notice of appeal from Order No. 734, as well as from Order No. 736 classifying creditors. However, before these appeals were perfected, the comprehensive plan thus approved was submitted to the creditors of the principal and secondary debtors for their acceptance or rejection, and on December 29, 1945, the Commission certified that the plan had been accepted by all classes of creditors voting excepting only the Housatonic bondholders and the bondholders of Old Colony. The Summary of Certificate [32] shows that, of the some $10,000,000 face amount of Old Colony bonds held by the Commission to have been validly voted, more than a majority thereof, $5,044,000, *rejected* the plan.

While the foregoing vote was in process, arguments on the various appeals from Order No. 734 were heard and on January 2, 1945, the Circuit Court of Appeals for the Second Circuit rendered its decision (147 F. 2d, 40), upholding the appeal of this Committee from, and *reversing*, Order No. 734 of the District Court purporting to approve the plan of reorganization for the principal debtor and secondary debtors as contained in the Fourth and Fifth Reports and Orders of the Interstate Commerce Commission.

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[30] 54 F. Supp. 631 (1944), Prior S.C. R., vol. A, Ex. 16, p. 11024.
[31] Stip. R. II, No. 21, p. 1, D. R. 11050.
[32] C.C.A. R., Ex. , D. R. 11516.

The plan for Old Colony thereupon became "twice-rejected"—once by the creditors of Old Colony and once by the Circuit Court of Appeals.

The Circuit Court of Appeals found that the purchase price for the Old Colony properties, franchises and assets fixed in those reports and orders was not founded upon an exercise by the Commission of its independent judgment in the vital matter of value, and that it was persuaded to approve the substantially reduced price solely because of the fact of purported compromise. The Court said:[33]

> "We conclude that the District Court's order of approval (#734) must be *reversed* so that the Commission may make its own independent findings of value and *price*. It is possible of course that the Commission may still adhere to figures which are the same as those of the Joint Report. Such correspondence would not in itself invalidate the Commission's conclusions if it *'shall state fully the reasons for its conclusions'* as required by section 77, sub. d, and such reasons are not the pressure exerted by the compromise." (Emphasis supplied.)

On January 30, 1945, Mandate No. 107 of the Circuit Court of Appeals was entered reversing Order No. 734 on the appeal of your petitioners, and affirming it as to all other appeals with one exception, but with leave to the District Judge "to remand to the Commission all or any portions of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan *in addition to those affecting Old Colony.*"[34] (Emphasis supplied.)

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[33] 147 F. 2d, 40, 50.

[34] Stip. R. II, No. 22, pp. 17, 18.

On February 13, 1945, the District Court entered its Order No. 792, entitled "Order of Reference,"[35] referring the comprehensive plan back to the Commission, "but only for the following purposes:

> "(1) For such further action with respect to the *price to be paid* for the Old Colony property as may be required by said Opinions and Mandate;
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> "(2) For such further action, if any, as the Commission in its discretion may decide to take with respect to Section N(2) and N(3) of the plan; and
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> "(3) For such adjustments, if any, as the Commission may deem necessary as a result of its action under Paragraphs (1) and (2) hereof." (Emphasis supplied.)

On March 15, 1945, your petitioner filed with the Commission its Petition for Hearing, but on May 14, 1945, the Commission certified to the District Court its Sixth Supplemental Report and Order,[36] denying said Petition for Hearing and approving the *precise* purchase price for the Old Colony properties based on the Joint Report and approved in its previous Fourth and Fifth Supplemental Reports and Orders. This is the final Report made by the Commission in these proceedings and is the Report which, with the decisions of the District and Circuit Courts hereinafter referred to, gives rise to many of the questions posed in this petition.

The Commission concluded:[37]

> "That the provisions of the plan as approved in the Commission's reports and orders of July 13, 1943 and

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[35] Stip. R. I, No. 2, p. 11582.
[36] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, pp. 11682, 11684.
[37] *Op. cit.*, 210, Stip. R. I, No. 3, p. 11703.

February 8, 1944 [38] relating to the *price to be paid* for acquisition of the property of the Old Colony Railroad Company, and the Sections N(2) and N(3) of said plan, be and they are hereby approved." (Emphasis supplied.)

On May 25, 1945, the District Court entered its Order of Notice of Hearing on Confirmation of Plan (Order No. 804),[39] providing for the filing of "objections to the approval of said Sixth Supplemental Order of the Commission and any objections to the confirmation of said plan."

On June 22, 1945, this Committee filed such objections, and on July 2, 1945, argued orally and filed its brief in support of such objections.

On June 30, 1945, just two days prior to the foregoing hearing, the Circuit Court of Appeals, in a proceeding instituted by your petitioner contesting the validity of the District Court's Order of Reference, rendered its decision [40] approving that Order, but stating that—

> "If having regard to all the circumstances the statute requires a further hearing and none was had, as the appellants assert, that objection as well as any others to the validity of the sixth supplemental report can be presented to the district judge when the report comes before him, and upon appeal should one follow. The prior appeal decided nothing except that the Commission had not made independent findings of value and of *price* and the statute requires that it should. *Hence the Commission's new report will be subject to attack upon any legal ground when it comes before the district court.*" (Emphasis supplied.)

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[38] The Fourth and Fifth Supplemental Reports of the Commission.
[39] Stip. R. I, No. 4, p. 11711.
[40] 150 F. 2d, 169, 170, Stip. R. No. 5, p. 11825.

On August 31, 1945, the District Judge entered his "Memorandum of Decision on Sixth Supplemental Order and on Confirmation of Approved Plan."[41] After reviewing certain of the objections of this petitioner to the Old Colony purchase price purportedly approved by the Commission in its Sixth Supplemental Report, and those relating to the vote of the Old Colony bondholders rejecting the plan, the decision concludes:[42]

> ". . . that there is nothing in the Sixth Supplemental Report and Order when read in the light of the underlying evidence of record to require me to revise the approval *heretofore* recorded of the plan proposed for the Old Colony as contained in the Fifth Supplemental Order and now confirmed and reiterated in the Sixth." (Emphasis supplied.)

On September 6, 1945, Order No. 821,[43] purporting to "reinstate" Order No. 734, which had been reversed on appeal, was entered; and on the same day, without notice or hearing and without any submission of the plan certified in the Sixth Report and Order to a vote of creditors, the plan was confirmed by Order No. 822.[44]

Order No. 821, entitled "Order on Sixth Supplemental Order of the Interstate Commerce Commission," provides as follows:[45]

> "A certified copy of the Sixth Supplemental Report and Order of the Interstate Commerce Commission, dated May 14, 1945, in its Finance Docket No. 10992, having been duly filed herein, and a hearing thereon

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[41] Stip. R. I, No. 11, p. 11891.
[42] *Op. cit.*, 11903.
[43] Stip. R. I, No. 12, p. 11922.
[44] Stip. R. I, No. 13, p. 11924.
[45] Stip. R. I, No. 12, p. 11922.

and on objections thereto having been had after due notice to all parties in interest, and the Court having filed its opinion herein on August 31, 1945, and being duly advised in the premises, it is ORDERED:

"That the record of this Court in the proceedings upon a plan be enlarged to include said Sixth Supplemental Report and Order of the Interstate Commerce Commission together with all evidence received at the hearing herein and that the order of this Court of March 6, 1944 (Order No. 734) approving the plan as contained in the Fifth Supplemental Order of the Commission, *being consistent with the requirements of the appellate opinions of January 2, 1945 and January 23, 1945 147 Fed. (2d) 40, and with the appellate mandate of January 30, 1945, in the light of the record as thus enlarged, in all respects be reinstated as an order of this Court in full force and effect.*" (Emphasis supplied.)

Order No. 822, entitled "Decree Confirming Plan of Reorganization," is a typical order of confirmation and need not be set forth in full herein. This decree confirms the plan as approved by Order No. 734, which was reversed on appeal and purportedly reinstated by Order No. 821, without any new vote by the creditors.

On October 4, 1945, your petitioners filed their Notice of Appeal from Order No. 821, from Order No. 734 as it may have been reinstated by Order No. 821, and from Order No. 822.

The Circuit Court of Appeals, after the filing of briefs and oral argument, entered on July 31, 1946, its Order requesting further argument and briefs upon specific questions addressed to the parties by the Court.[46]

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[46] Stip. R. II, No. 28, p. 89.

Following the filing of said further briefs and oral argument, the Circuit Court of Appeals on January 13, 1947, in a majority opinion by Judge Swan, and a concurring opinion by Judge Learned Hand, with Judge Frank dissenting (in part), affirmed [47] the Orders of the District Court Nos. 821 and 822 purporting to approve and confirm the comprehensive plan for all debtors including Old Colony. Judge Swan said: [48]

> "Since in the case at bar the plan contemplates a *sale* of Old Colony assets to the reorganized New Haven, the appellant argues that the Commission could not lawfully proceed as it did, but must follow the doctrine applied in *First Nat. Bank* v. *Flershem*, 290 U.S. 504, 527, under which 'A detailed appraisal must . . . be made of the Corporation's assets as of the date of the sale, based upon then values and the possibility of disposing of them in parcels, as well as an entirety.' " (Emphasis supplied.)

Judge Swan, after stating his reasons for rejecting this contention, asserted that, for valuation purposes, it made not "the slightest difference" that the plan provided for the transfer of Old Colony properties to the New Haven for a "price," and adopted a concept of the position of the Old Colony bonds in the reorganization which had never been suggested by any party, court or commission in any of these proceedings prior to this appeal to the Circuit Court. He stated: [49]

> "We agree with appellees' argument that the properties of the Old Colony are, for purposes of the plan, on the same footing with respect to the whole system

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[47] F. 2d, , Stip. R. I, No. 15, pp. 12655, 12685.
[48] *Op. cit.*, , Stip. R. I, No. 15, p. 12666.
[49] *Op. cit.*, , Stip. R. I, No. 15, p. 12667.

as are lines securing a divisional mortgage of New Haven."

Your petitioners, in the light of Judge Frank's dissent [50] addressed in part to the foregoing conclusion of the majority of the Court, and in the light of the doubts and uncertainties expressed by Judge Hand in his concurring opinion as to the correctness of the majority decision on other points, filed on January 24, 1947, their Petition for Rehearing,[51] of limited scope. The Court denied this petition on February 1, 1947, and on February 4, 1947, entered its Mandate accordingly. Subsequent to the filing of the opinions, the Circuit Court of Appeals filed a document entitled "Errata," [52] which modifies and corrects the opinions of Judge Swan and Judge Frank in some material respects.

Thereafter, in view of the complex record and the even more complex questions herein presented for your consideration, your petitioners petitioned this Court for an order extending the time for filing petitions for writs of certiorari to and including May 15, 1947. The petition was allowed and the order [53] entered on April 1, 1947, extending the time as prayed for.

The Assets of Old Colony.

Old Colony's *operating properties*,[54] which have been operated by the trustees of the New Haven "for the account of" Old Colony, consist of some 529 miles of road

[50] *Op. cit.*, , Stip. R. I, No. 15, p. 12691.
[51] Stip. R. I, No. 16.
[52] Stip. R. I, No. 17, p. 12765.
[53] Stip. R. II, No. 32, p. 117.
[54] Original Report of Commission, 239 I.C.C. 337, 342, 348 (1940), Prior S.C. R., vol. A, Ex. 1, pp. 7863, 7875, 7917.

radiating throughout southeastern Massachusetts and extending into southern Rhode Island. Including yard tracks and sidings, it owned 1006 miles of all track as of December 31, 1936. Its lines serve and in some instances provide the only rail service for such industrial communities as Boston, Quincy, Brockton, Plymouth, Fall River, New Bedford, Lowell and Lawrence, Massachusetts, and Newport, Rhode Island. It also provides transportation to and from the resort centers located along the southern Massachusetts coastline, including Cape Cod.[55] Old Colony, in addition to its connections with the New Haven, has direct connections to the north and west with the Boston & Maine Railroad at Fitchburg and Lowell, Massachusetts, and with the Boston & Albany Railroad at Framingham and Boston, Massachusetts. As of December 31, 1936, the Interstate Commerce Commission Bureau of Valuation found the original cost of the Old Colony operating properties to be $50,210,654, the cost of reproduction new $61,889,070, reproduction new less depreciation $41,154,756, and the value of land and rights to be $12,524,502.

Old Colony also owns the so-called Market Terminal properties in South Boston,[56] to which properties the Commission in its Sixth Report appears to accord a value over and above the value indicated for the operating properties just described. These terminals (not to be confused with the South Station passenger terminal of Boston Terminal Company) are leased to certain produce dealers through the medium of Boston Market Terminal Company,

[55] New England Transportation Company, a wholly owned subsidiary of the principal debtor, provides a competing bus and truck service in a large part of the Old Colony territory. Old Colony neither receives nor is credited with any of the earnings of this profitable operation.

[56] (First) Supplemental Report, 244 I.C.C. 239, 260, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8064.

a company controlled jointly by the New Haven Railroad and the dealers. Old Colony has no interest whatsoever in this company. It is said that over 80% of all produce delivered to Boston by rail and sold by receivers arrives initially at these terminals, that the annual value of such produce amounts to approximately $60,000,000, and that substantially all of it is transported over the lines of the New Haven.[57]

Old Colony's *non-operating properties* are composed of (1) the unsecured claim against the New Haven for breach of lease adjudicated by the District Court at $47,186,963,[58] from which adjudication an appeal is pending and kept alive by a stipulation to which your petitioners are not a party; (2) the suit against the Bankers Trust Company [59] for some $13,379,215, having a relation to the amount of the lease claim by virtue of Section L of the plan of reorganization, (3) the one-half stock interest in Union Freight Railroad,[60] which runs between the South and the North Stations along Atlantic Avenue, Boston, serving the docks and industries located there and otherwise providing a bridge line between the Boston & Maine and New Haven systems, and (4) the $3,600,000 of New Haven first and refunding bonds,[61] upon which interest has been paid during the pendency of these proceedings in an amount of

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[57] See complaint filed on October 15, 1946, by United States of America against New York, New Haven and Hartford Railroad Company and others, instituting proceedings in the District Court of the United States for the District of Massachusetts, Civil No. 6070, under Section 4 of the Sherman Anti-Trust Act.

[58] Sixth Supplemental Report, 261 I.C.C. 195, 205, Stip. R. I, No. 3, pp. 11682, 11696.

[59] *Op. cit.*, 205, Stip. R. I, No. 3, p. 11695.

[60] *Op. cit.*, 205, Stip. R. I., No. 3, p. 11695. The other one-half interest is owned by the Boston & Providence and would also be acquired by the principal debtor, if the offer of the plan to that road should be accepted.

[61] *Op. cit.*, 205, Stip. R. I, No. 3, p. 11695.

$1,080,000 to August 31, 1945, and placed on special deposit in the Merchants National Bank of Boston.[62]

Item (1), the lease claim adjudicated at $47,186,963, is a claim against the New Haven estate growing out of the bankruptcy proceedings. In the absence of any plan to the contrary, this claim would participate in the New Haven reorganization as an unsecured claim to be satisfied with common stock of the reorganized New Haven in an approximate amount of 400,000 shares, or more than 40% of the total issue of common stock. From its nature it is not a part of the operating properties of Old Colony, and likewise, from its nature, need not of necessity be sold to the New Haven in protection of the public interest.

Item (2), the claim against the Bankers Trust, being against a third party, affects the disposition of Old Colony assets only because the New Haven is in turn required to indemnify the Bankers Trust for any loss it may suffer on account of this claim (Plan, Section L). Any amount recovered on this claim by the Old Colony should therefore go to reduce the amount recoverable from New Haven under the lease claim. These two assets, (1) and (2), may be further classified as unproductive in the sense that they have no earnings (except possibly interest). Item (3), the stock of the Union Freight Railroad, is an asset potentially salable to the Boston & Maine Railroad or other interests. Item (4), the $3,600,000 of New Haven first and refunding bonds, consists of listed securities having a current market value, which are capable of being disposed of in the open market.

These four non-operating assets of Old Colony bulk large in the total assets, are not necessary to the operation of its railroad system and are capable of separate appraisal and sale independently of its operating assets, and

[62] Stip. R. I, No. 11, pp. 11891, 11895-11896.

are not subject to the same considerations of public interest as are the operating properties.

Taking the values "*assigned*" by the Commission to the non-operating properties and the *maximum* values indicated by the Commission for the operating properties [63] and comparing them, the following results are obtained:

Non-operating Properties

(1) 1/2 stock Union Freight R.R.	$ 235,000
(2) Bankers Trust claim	3,250,000
(3) $3,600,000 New Haven bonds	2,010,000
(4) Unsecured lease claim	3,110,313
	$ 8,605,313

Operating Properties

(1) Railroad properties	$8,000,000
(2) Market Terminal properties	4,350,128
	$12,350,128

On this basis Old Colony's non-operating assets constitute over 41% of the whole and its operating assets less than 59% thereof.

Taking the "cash values" accorded the same assets by Judge Hincks in Note 4 of his Opinion dated August 31, 1945, entitled "A Permissible Valuation of Old Colony," [64] and similarly comparing them, the following results are obtained:

[63] Sixth Supplemental Report, 261 I.C.C. 195, 204-207, Stip. R. I, No. 3, pp. 11682, 11694-11700.

[64] Stip. R. I, No. 11, pp. 11891, 11915.

Non-operating Properties

(1) 1/2 stock Union Freight R.R.	$ 235,000
(2) Bankers Trust claim	3,250,000
(3) $3,600,000 New Haven bonds	2,010,000
(4) Interest accrued on above bonds and paid	928,000
(5) Lease claim	4,174,011
	$10,597,011

Operating Properties.

(1) Railroad property including Market Terminal properties	$3,399,040
(2) Excess value Market Terminals	1,776,412
	$5,175,452

Upon this basis the value of the operating properties amounts to less than 33% of the total value of all assets, with the non-operating assets constituting more than 67% thereof.

Old Colony's Liabilities.

The liabilities of Old Colony in the order of their priority, being those that constitute a lien upon these various assets,[65] consist of (1) the prior lien claim of the principal debtor taken by the Commission in its Sixth Report at $10,494,844 [66] and comprised of (*a*) $6,081,148, the loss *estimated* to have been sustained by the trustees of the

[65] Unsecured claims such as current liabilities are excluded from participation in the plan for Old Colony, as is its outstanding capital stock of $25,000,000 par value.

[66] 261 I.C.C. 195, 204, Stip. R. I, No. 3, pp. 11682, 11694.

principal debtor from their operation of the Old Colony properties "for the account of Old Colony" through December 31, 1943,[67] and (*b*) $4,413,796 of Boston Terminal Company (South Station) bond interest, Boston Terminal Company and Old Colony taxes, and administration expenses owed or claimed to be owed by Old Colony; and (2) the claim of the bonds of Old Colony, secured by a mortgage indenture upon its railroad properties and lease,[68] in the principal amount of $16,448,000, plus some $5,164,000 of interest accrued through December 31, 1943, or a total claim of approximately $21,612,000.[69]

The Plan for Old Colony.

The plan for Old Colony may be found in Section N of the comprehensive plan contained in the Fifth Supplemental Report and Order of the Commission.[70] It provides for the acquisition by the reorganized New Haven of all the Old Colony operating and non-operating properties described above, with the exception of the so-called Boston Group properties, which, according to studies made, have

[67] On July 18, 1938, the District Court entered its Order No. 300 adjudicating the amount of this claim for the period ending December 31, 1937. There has been no adjudication of the trustees' accounts for any subsequent period. Order No. 300 also reserved for later determination the question of interest upon the amount of this claim, but no such determination has been made.

[68] See petition of Old Colony Trust Company, Trustee for Old Colony R. Co. bonds, D. R. 1113.

[69] In its (First) Supplemental Report, 244 I.C.C. 239, 267-268, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072, the Commission found that the claim of the Old Colony bonds for principal and interest accrued to December 31, 1939, was $19,655,683. It has made no finding as to the amount of this claim since that Report in 1941.

[70] 257 I.C.C. 9, 50, Stip. R. I, No. 1, pp. 10831, 10908.

contributed substantially to Old Colony's alleged recurrent deficits. The so-called Boston Group properties, largely commuter lines feeding Boston, would be retained by Old Colony, debtor, as its sole asset under a modified charter and a reduced capitalization equal to the salvage value of these properties, namely, $2,328,895. But the New Haven is given a free right of user of these properties both in passenger and in freight service, and is permitted, and under certain circumstances is required, to take over such properties, without payment of further considerations; and, under other circumstances, the Commonwealth of Massachusetts has the option to purchase the Boston-Braintree segment of the Boston Group properties at its salvage value, the consideration therefor being paid to the reorganized New Haven.[71]

The New Haven would pay for the diverse operating and non-operating properties of Old Colony (1) by cancellation of its prior lien claim taken at $10,494,844, and (2) by issue directly to the bondholders of Old Colony of $4,398,305 face amount of new first and refunding mortgage (fixed interest) bonds and $3,298,728 face amount of the new general mortgage (income) bonds, both of the reorganized New Haven; in such case, the authorized capitalization of the reorganized New Haven of $365,000,000 face amount of new securities is to be increased by the amount of the securities issued to the Old Colony bondholders.

The plan also includes the provision U(3), quoted above, authorizing the District Court in its discretion to eliminate from the plan all provisions for reorganization of Old Colony, if it considers that opposition of Old Colony or other interests not connected with the New Haven will

[71] The plan does not state a price for this segment of the Boston Group properties.

unreasonably and unnecessarily delay the reorganization of the New Haven.

Questions Presented for Certiorari.

The questions presented by this petition are:

1. Whether the proper legal standards applicable under Section 77 to valuation of the diverse operating and non-operating properties of one debtor (Old Colony) for purposes of their sale to another debtor (New Haven), under a plan of reorganization, are not different from the standards applicable when, as in the *Milwaukee* case, 318 U.S. 523, the purpose of valuation is to determine the relative values of divisional properties or liens within the approved system capitalization of a single debtor.
2. Whether the holding of the majority of the Circuit Court of Appeals that the valuation methods and standards of the *Milwaukee* case applicable to properties subject to divisional liens may lawfully and properly be applied to the valuation of the Old Colony properties in the circumstances of this case was not erroneous, and whether the Court should not have required the Interstate Commerce Commission to observe the valuation standards of Section 77(b)(5) as to fixing a "fair upset price" for a sale of the debtor's properties to the reorganized New Haven.
3. Whether the Commission was not required, by way of fixing a "fair upset price" under Section 77(b)(5) and in accordance with the underlying principles established in *First National Bank* v. *Flershem*, 290 U.S. 504, to find the fair cash value of each of the diverse operating and non-operating

properties of Old Colony, and the probable market or cash value of each class of the new New Haven securities to be given in payment for such properties under the plan of reorganization.

4. Whether, for purposes of the plan, treatment of the Old Colony properties as "on the same footing with respect to the whole system as are lines securing a divisional mortgage of New Haven," and implied treatment of the Old Colony bonds, as on the same footing as a New Haven divisional lien are not inconsistent with the position of this Court in *Palmer* v. *Webster & Atlas Nat. Bank,* 312 U.S. 156.

5. Whether, if the Old Colony properties, for purposes of the plan, are on the same footing as a division of the New Haven and the Old Colony bonds rank as a New Haven divisional lien, the plan for Old Colony is not unfair, inequitable, discriminatory, and in conflict with the principles of the *Milwaukee* case, 318 U.S. 523, in that the prior lien claim of the New Haven against the Old Colony, instead of being treated as a New Haven system obligation, is to be collected out of the Old Colony assets before the Old Colony bonds are permitted to participate in the capitalization of the reorganized New Haven.

6. Whether, if the Old Colony lines are, for purposes of the plan, on the same footing as a division of the New Haven and the Old Colony bonds rank as a New Haven divisional lien, the plan of reorganization is not unfair, inequitable, discriminatory, and in violation of the rule of the *Boyd* case, 228 U.S. 482, in failing to provide for the participation in the plan, with other unsecured New Haven creditors, of the excess of the $21,610,000 claim of the

Old Colony bonds for principal and accrued interest above the $7,697,033 face amount of new securities representing the net value, as determined by the Commission, of the *assets* securing the Old Colony bonds.

7. Whether, in operating the Old Colony lines as part of the New Haven system for forty-two years under the lease (rejected in the reorganization), the New Haven has commingled the assets and absorbed and dominated the management functions of its lessor-subsidiary to such extent that the New Haven assets cannot be insulated from claims of creditors of its subsidiary Old Colony, and, consequently, that the New Haven is responsible for obligations of its subsidiary (such as the Old Colony bonds) incurred or arising during the New Haven's management.
8. Whether the action of the Commission in reporting and approving, in its Sixth Supplemental Report and Order, the valuation and price provisions of the plan of reorganization as to Old Colony was not (*i*) arbitrary and capricious in view of its previous determinations and reports in the matter, or (*ii*) so deficient in its statement of the reasons for its conclusions, as to render it impossible for the Court to determine whether proper methods and legal standards were applied, so that, in either case, the return of the plan to the Commission for consideration under proper legal standards is required.
9. Whether the plan of reorganization reported in the Sixth Supplemental Report and Order is not materially defective, unfair and inequitable, because, on the face of the record, the Commission in its valuation of the Old Colony assets to be acquired by New Haven and of the price therefor, entirely omitted and failed to take into account a cash de-

posit representing interest impounded by the District Court on $3,600,000 first and refunding bonds of New Haven owned by Old Colony; or because the District Court has neglected to determine the validity and amount of the Old Colony's claim to this interest cash fund.

10. Whether, on the face of the record, the Commission failed in the Sixth Supplemental Report to apply proper legal standards by improperly deducting from Old Colony's unsecured claim for breach of lease the face amount ($13,000,000) of Old Colony's claim against Bankers Trust Company, instead of only $3,250,000, the value "assigned" by the Commission to this claim, thereby determining a net value for the unsecured lease claim so inadequate as to render the plan of reorganization unfair and inequitable with respect to Old Colony.

11. Whether the plan of reorganization reported in the Sixth Supplemental Report is not materially defective, unfair and inequitable, because the Commission—in applying (in lieu of cash) to payment of the New Haven's prior lien claim against Old Colony the new securities distributable under the plan upon the $3,600,000 of New Haven first and refunding bonds owned by Old Colony, and upon its unsecured claim for breach of lease—failed to make its own independent finding of the probable market or cash values as of December 31, 1943, of the new New Haven securities distributable on such claims; or because the Commission, if it did find such values, based its findings on wholly insubstantial and obsolete evidence.

12. Whether, after the Joint Report was filed with it, the Commission was not required, under the provisions of Section 77(d) and (e), to hold hearings

for the reception of evidence and argument thereon, particularly with respect to the price to be paid for the Old Colony properties, first proposed in the Joint Report.

13. Whether—when the Circuit Court of Appeals (147 F. 2d, 40, and 150 F. 2d, 169), on the appeal of your petitioners, reversed the District Court's order approving the plan of reorganization reported in the Fifth Supplemental Report, leaving it to the District Court to remand either the entire plan or the Old Colony portion thereof to the Commission so that the Commission might make its independent determination of the value of Old Colony assets and the price therefor and state its reasons, and when the District Court remanded to the Commission the entire plan but for the limited purpose of such further action with respect to the price to be paid for the Old Colony properties as might be required by the decision of the Circuit Court of Appeals—the Commission was obligated to "hold public hearings" on the plan for Old Colony under Section 77(d) and (e), and acted unlawfully in denying the petition for such hearing filed on behalf of the Old Colony bondholders.

14. Whether the rejection of the plan of reorganization, approved in the Commission's Third, Fourth and Fifth Supplemental Reports and Orders, by the holders of a majority of the Old Colony bonds voting was not reasonably justified, in view of the subsequent determination of the Circuit Court of Appeals (147 F. 2d, 40) that said Report was fundamentally defective because the Commission had not exercised its independent judgment in approving the plan submitted to such bondholders.

15. Whether the provisions of Section 77(e) did not require that, prior to the confirmation by the District Court of the plan of reorganization based on the Commission's Sixth Supplemental Report and Order, the plan be submitted by the Commission to at least the Old Colony bondholders for acceptance or rejection.
16. Whether the "cram down" provisions of Section 77(e) authorizing a Court to confirm a plan of reorganization despite lack of acceptance thereof by creditors were sufficient authority to the District Court to confirm the plan of reorganization for the Old Colony, debtor, despite the fact that the plan was rejected by a voting majority of the *only* class of creditors of the debtor affected by and participating in the plan; and whether such provisions, if construed (as they have been by the Courts below) to authorize such action, violate due process of law under the Fifth Amendment to the Constitution.
17. Whether, upon the reversal by the Circuit Court of Appeals below (147 F. 2d, 40, and 150 F. 2d, 169) of the District Court's previous order approving the plan of reorganization for Old Colony, the District Court failed to comply with the applicable requirements of Section 77 in entering its Orders No. 821 and No. 822 approving and confirming the plan on the basis of and with respect to the Commission's Sixth Supplemental Report and Order, and whether the order of the Circuit Court of Appeals below affirming such orders should not be reversed.

Specification of Errors.

The Circuit Court of Appeals below erred—

(1) In affirming Order No. 821 of the District Court enlarging the record to include the Sixth Supplemental Report and "reinstating" its Order No. 734, which approved the plan as reported in the Fifth Supplemental Report; and in affirming Order No. 822 of the District Court confirming the plan of reorganization referred to in the Sixth Supplemental Report of the Commission. (See Question 17.)

(2) In holding that the Commission applied proper legal standards, properly considered each element of value and did not wrongly decide legal questions as to valuation of assets and allotment of securities, in respect to the plan of reorganization for the Old Colony. (See Questions 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13.)

(3) In holding that the plan does not provide for a sale to the reorganized New Haven of the assets of Old Colony, debtor, such as to require fixing a "fair upset price" therefor under Section 77(b)(5). (See Questions 1, 2 and 3.)

(4) In holding that the Old Colony properties, for purposes of the plan, are on the same footing as are lines of New Haven securing a divisional mortgage, and that the valuation principles of the *Milwaukee* case therefore apply to valuation of the Old Colony properties and the compensation for the Old Colony bonds. (See Questions 1 and 2.)

(5) In holding that, on the assumption that the Old Colony bonds may properly be treated on the footing of a divisional lien of New Haven, the plan of reorganization is fair and equitable as to Old Colony, and the legal standards of the *Milwaukee* case as to full compensatory treatment of the Old Colony bonds have been properly applied

by the Commission and the District Court. (See Questions 4, 5, 6, 9, 10 and 11.)

(6) In holding that the Commission did properly take into account as an asset of Old Colony the interest, held in special deposit, on $3,600,000 first and refunding bonds of New Haven owned by Old Colony. (See Question 9.)

(7) In holding that the Commission did set off to a proper extent the Bankers Trust claim of Old Colony against the Old Colony's claim for breach of lease, in determining the net value of the breach of lease claim. (See Question 10.)

(8) In holding the plan of reorganization of Old Colony fair and equitable, and in compliance with Section 77. (See Questions 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11.)

(9) In holding that the Commission in its Sixth Supplemental Report did exercise its own independent judgment as to the valuation of and price for the Old Colony, and adequately stated its reasons for fixing such price at exactly the figure determined by representatives of the New Haven and its creditors in the Joint Report. (See Question 8.)

(10) In holding that the Commission was not required by Section 77 to hold hearings upon the elements of the plan presented by the Joint Report, after the Joint Report was filed in April, 1942. (See Question 12.)

(11) In holding that the Commission was justified in refusing your petitioners a hearing either upon the elements of the plan remanded to the Commission, or upon changes in the situation, after the order of the District Court approving the plan presented by the Fifth Supplemental Report had been reversed in part by the Circuit Court of Appeals (147 F. 2d, 40). (See Question 13.)

(12) In holding that the plan reported in the Sixth Supplemental Report need not be submitted for acceptance or rejection, at least by the Old Colony bondholders, prior to

confirmation of such plan by the District Court; and that the prior submission of the plan reported in the Fifth Supplemental Report was valid and sufficient, although such plan was subsequently held invalid by the Circuit Court of Appeals (147 F. 2d, 40) on the ground that the Commission had not exercised its independent judgment as to the valuation of and price for Old Colony. (See Questions 13 and 14.)

(13) In holding that the Old Colony bondholders were not reasonably justified in rejecting the plan which the Circuit Court of Appeals subsequently held invalid on the ground that the Commission had not exercised its independent judgment as to the valuation of and price for Old Colony. (See Question 14.)

(14) In holding that the District Court was justified, and acted in compliance with due process of law, in confirming the plan for reorganization of Old Colony in spite of the rejection thereof by the holders of a majority of the Old Colony bonds voting, being the only class of creditors of Old Colony, debtor, affected by and participating in the plan. (See Question 16.)

Reasons for Granting the Writ.

I. *Question 1* presents for determination a question which is basic to the plan of reorganization for Old Colony. All the decisions of this Court which have laid down the proper standards of valuation by the Interstate Commerce Commission under Section 77 have dealt with the valuation of divisional lien claims based on divisions of a single debtor's railroad lines. *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 87 L. ed. 892. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523, 558, 87 L. ed. 959, 1004. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W. R. Co.*,

U.S. , 90 L. ed. 1134, 1145. (In the *Milwaukee* case, the Terre Haute lessor was not in reorganization.)

As stated in the *Rio Grande* case (p. 1146), there must be an "allocation of securities representing the *system value* to each class of [divisional] claimants." (Emphasis supplied.) The purpose is to retain the "*relative* priority of position" of the senior creditors in the reorganization, and to assure full compensation in order of seniority.

The purpose of valuation is quite different in the case of an independent railroad such as the Old Colony, the properties of which are to be sold to another railroad, such as the New Haven. The Old Colony is an independent corporate entity; and, since its lease to New Haven was rejected by the New Haven trustees and its stock (held by the New Haven and the public) declared worthless by the Interstate Commerce Commission, the New Haven has no interest of any kind in the Old Colony's properties. Old Colony's separate position is emphasized by the fact that some of its most valuable assets have arisen from the reorganization itself—that is, the Old Colony claims against the New Haven, debtor, and against the Bankers Trust Company, arising out of the rejection of its lease to New Haven. Likewise, a prior lien claim of the New Haven trustees against the Old Colony has arisen from the operation of the Old Colony lines by the New Haven trustees "for the account of" the Old Colony during the reorganization proceedings.

In such circumstances, it appears that the purpose of valuation is either (1) to fix a price to be offered by the reorganized New Haven for the Old Colony, which the Old Colony interests may freely accept or reject (as in the matter of the Terre Haute lines in the *Milwaukee* case); or (2) to determine the fair value of and price for the Old Colony properties, if to be acquired by the reorganized New Haven under a plan. But, in such latter case, the

objective of valuation is an *absolute* fair value, without reference to such considerations of *relative* position as apply to divisional liens.

Whether the foregoing distinction between the valuation standards for divisional properties and claims and the standards for acquisition of former leased lines and other properties of an independent debtor is a sound distinction, and, if so, what are the proper valuation standards applicable in the latter case, are questions which have not been settled by this Court, but should be, in the interest of efficient conduct of reorganizations under Section 77.

II. *Question 2* presents one of the basic conflicts of opinion with respect to the valuation of the Old Colony properties for the purposes of the plan of reorganization referred to in the Sixth Supplemental Report and Order of the Interstate Commerce Commission,[72] and with respect to the treatment accorded the Old Colony bonds in the plan.

The majority of the Circuit Court of Appeals for the Second Circuit have taken the position [73] that, if the Interstate Commerce Commission has applied valuation methods or standards for this purpose sufficient to comply with the standards established in the *Milwaukee* case [74] for valuation to establish the participation of divisional liens of a railroad system, the provisions of the plan with respect to Old Colony cannot be disturbed.

In addition to the principles set forth under I, above, which are equally applicable here, your petitioners represent (*i*) that the plan itself, and all prior proceedings of the Commission and the Courts up to the decision of the

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[72] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

[73] F. 2d, , Stip. R. I, No. 15, pp. 12655, 12667.

[74] Institutional Investors v. Chicago, Milwaukee, St. P. & P. R. Co., 318 U.S. 523, 87 L. ed. 959 (1943).

Circuit Court of Appeals of which review is now sought, have consistently dealt with the Old Colony Railroad as an independent entity, and with the proposed transfer of its assets to the reorganized New Haven as a sale, and (*ii*) that consequently the Commission was required in effect to fix a "fair upset price" for the properties under the provisions of Section 77(b)(5) relating to sales; and further (*iii*) that fixing of a "fair upset price" required the Commission to find the fair cash sale value of the Old Colony properties and the probable market values of the new New Haven securities to be exchanged therefor or applied to satisfaction of the prior lien claim—findings which the Commission has not made. This was the basis, in part, of the dissenting opinion [75] in the Circuit Court of Appeals below. The majority of the Circuit Court of Appeals consider the "fair upset price" provisions as optional, at best.

This Court has not heretofore determined under Section 77 the question whether—in a case like that of Old Colony, which is a subsidiary of New Haven, a secondary debtor in the same reorganization proceedings, the lessor of an unexpired lease rejected by the trustees of the lessee New Haven, and a company whose lines are being operated by the lessee's trustees involuntarily for the account and risk of the Old Colony—the valuation methods or standards applicable are those established in the *Milwaukee* case for divisional liens or, on the contrary, are those necessary to determine a "fair upset price" for a sale under Section 77(b)(5).

Whether the principles of valuation of the properties of a former lessor and co-debtor as stated by the Circuit Court of Appeals majority are correct is a question of importance to the administration of the railroad reorganiza-

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[75] F. 2d, , Stip. R. I, No. 15, pp. 12691, 12699-12700.

tion provisions of the Bankruptcy Act, upon which even the Circuit Court of Appeals for the Second Circuit is internally divided, and which has not been settled by this Court, but should be in the interests of proper administration of Section 77.

III. *Question 3* more specifically raises the same questions as to the application of the "fair upset price" provisions of Section 77(b)(5) argued in the dissenting opinion [76] filed in the Circuit Court of Appeals below. The application of these provisions, at least to a sale by a debtor in the position of Old Colony, presents a question of first impression and of great importance, on which again the Circuit Court of Appeals is divided, and which has not been settled by this Court, but should be.

The statutory provision in Section 77(b) here referred to is:

> "A plan of reorganization . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, . . ."

As stated above in II, Judge Swan has said,[77] for the majority of the Circuit Court of Appeals below, that the provisions of Section 77(b)(5) as to upset price are "optional, not mandatory," as to any property which passes *to* the debtor or to the new reorganized company, referring to the reorganized New Haven under this plan. This views the provision from the wrong angle, that of the purchaser; the upset price provision of subsection (b)(5) applies to sales *by* the debtor, in this case the Old Colony. Subsection (b)(5) does provide a choice of meth-

[76] *Op. cit.*, , Stip. R. I, No. 15, pp. 12691, 12699.
[77] F. 2d, , Stip. R. I, No. 17.

ods for execution of the plan; but, if a "sale of all or any part of the property of the debtor" is the method chosen, as in this plan, there is no option given as to whether such sale shall be "at not less than a fair upset price."

The principles of valuation applicable to determination of an upset price are set forth in *First Nat. Bank* v. *Flershem.*[78]

Since, as pointed out in I, above, the New Haven now has no interest in the *property* of the Old Colony, a *sale* is essential, if the New Haven is to acquire such property. Under the statute, such a sale requires that a "fair upset price" be fixed. This neither the Commission nor the Court has attempted to do.

IV. *Question 4* presents the point that the decision of the majority in the Circuit Court of Appeals below is probably in conflict with the decision, or the underlying basis of the decision, of this Court in *Palmer* v. *Webster & Atlas Nat. Bank.*[79] This doubt on an important issue should be resolved. The Circuit Court of Appeals in its majority decision below is the first Court or commission to take the position that the plan of reorganization with respect to the acquisition of the Old Colony assets by the reorganized New Haven does not in fact and substance provide for a *sale* by the Old Colony, and to hold instead that the transfer from one corporation to the other is a mere formality and, in effect, that the mortgage bonds of the Old Colony are in the same status for purposes of reorganization and valuation as any divisional lien of the New Haven.

On the other hand, this Court, in *Palmer* v. *Webster & Atlas Nat. Bank,* held that the New Haven trustees, in

[78] 290 U.S. 504, 527, 78 L. ed. 465, 479 (1934).
[79] 312 U.S. 156, 85 L. ed. 642 (1941).

operating the Old Colony lines, after the rejection of the Old Colony lease under Section 77, were not conducting the business of the Old Colony lines but merely operating them to prevent public inconvenience; and that the New Haven trustees in operating the Old Colony lines for the account of Old Colony were not, of course, obligated to pay the debts of the Old Colony nor to advance New Haven funds without security, nor to pay obligations unless incurred as essential to the continued operation of the railroad. This decision appears to be founded clearly on the conception that, upon the rejection of this lease by the New Haven, the Old Colony became a distinct entity and subject to all risks of business loss, although for public convenience its lines were operated by others under Court order. This concept is confirmed by the orders of the District Court, and of the Circuit Court of Appeals for the Second Circuit [80] which established operating losses incurred by the New Haven trustees in operating the Old Colony lines under the jurisdiction of the Court for the account of Old Colony as claims against the separate Old Colony estate constituting a prior lien, the New Haven trustees being subrogated to the rights of the suppliers of goods or services. Such prior lien claim, amounting to some $10,500,000 as of December 31, 1943 (covering operating losses, taxes, Boston Terminal charges and the Old Colony's reorganization expenses), is treated as a first charge upon the Old Colony assets in the plan of reorganization.[81] See Frank, J., dissenting in Circuit Court of Appeals below.[82]

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[80] Palmer v. Palmer, 104 F. 2d, 161 (1939).

[81] 261 I.C.C. 195, 204, 207 (1945), Stip. R. I, No. 3, pp. 11682, 11694, 11698.

[82] Stip. R. I, No. 15, pp. 12691-2, 12697-8, and No. 17, p. 12765.

Your petitioners submit that the decision below to treat the Old Colony bonds as a divisional lien of the New Haven, and subject to the same valuation standards, appears to be plainly in conflict with the views of this Court, as expressed in the case referred to above, and that the question is fundamental to any consideration of the fairness and equitableness of the plan of reorganization with respect to the Old Colony.

V. *Question 5* points out one striking inconsistency in the treatment of the Old Colony in the plan of reorganization, if the position of the Circuit Court of Appeals majority discussed under II, above, is allowed to stand. If the Old Colony bonds have no status in the reorganization other than that of a divisional lien of the New Haven, and if *also,* as the plan provides, the compensation to be given such Old Colony "divisional" bonds is to be reduced by the flat deduction of the prior lien claim totaling some $10,500,000 in the aggregate,[83] the resulting participation of the Old Colony bonds in the reorganization has not been determined by the application of proper legal standards as prescribed by this Court in the *Milwaukee* case.[84] To hold that the rights of the Old Colony bondholders with respect to valuations of their interest and participation in the plan are on the same footing as the rights of New Haven divisional lien holders, and at the same time to hold that the Old Colony is to be independently charged on a segregated basis for operating losses and administrative charges, as no other New Haven divisional lien holders have been, is, from the standpoint of the New Haven, a clear case of "eating your cake and having it too," and,

[83] Sixth Supplemental Report, 261 I.C.C. 195, 204, 207. Stip. R. I, No. 3, pp. 11682, 11694, 11698.

[84] 318 U.S. 523, 87 L. ed. 959 (1943).

for that reason, in conflict with the decisions of this Court in the *Milwaukee* and other cases. See Judge Frank, dissenting below.[85]

VI. *Question 6* raises the question of another inconsistency in the plan of reorganization, if the Old Colony properties are, as the Circuit Court of Appeals majority hold, on the footing of a division of the New Haven and the Old Colony bonds are treated as a divisional lien of New Haven. On that basis, the claim of the Old Colony bonds against the New Haven estate would consist of the total principal plus accrued and unpaid interest to the "cut-off" date, which has been treated as December 31, 1943, for Old Colony.

The Commission in its (First) Supplemental Report[86] established the amount of the Old Colony bonds claim as of December 31, 1939, as $16,448,000 face amount plus unpaid interest to that date to make a total claim of $19,655,683. We compute the additional interest to December 31, 1943, to make the total claim of the Old Colony bonds approximately $21,612,000.

The Sixth Supplemental Report[87] of the Commission purports to measure the distribution of new securities distributable under the plan in satisfaction of the Old Colony bonds exclusively by the Old Colony's *assets* (which are, wholly or partly, only the security for the bonds), instead of by the amount of the *claim* of the bonds, as would be the case if the Old Colony bonds were on the same footing as New Haven divisional liens. The portion of the bond claim not compensated by the plan may amount to as much

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[85] F. 2d, , Stip. R. I, No. 15, pp. 12691, 12697.

[86] 244 I.C.C. 239, 267-268 (1941), Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072.

[87] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

as $14,000,000, as shown in detail in the accompanying Brief on this question (page 4).

In the *Milwaukee* case [88] this Court directed the District Court to "determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." The Old Colony bonds assuredly do not receive under the plan any *other* form of compensation for the loss of their senior rights. Neither the Commission nor the District Court discusses compensatory treatment on the basis of the face amount of the Old Colony bond claim, as they failed to do in the *Milwaukee* case also.

For these reasons also, if the divisional lien theory is allowed to stand, the plan is unfair and inequitable as to the Old Colony. This Court should enforce the application of proper legal standards in that respect.

VII. *Question 7* raises the question whether the decision of this Court in the *Consolidated Rock Products* case,[89] with respect to the right of creditors of the subsidiary companies there to claim against the parent, does not likewise apply in the case of domination and commingling of assets by an operating railroad lessee (and parent) with respect to a non-operating lessor (and subsidiary). This doctrine is distinct, in theory, from the divisional lien theory advanced by the Circuit Court of Appeals below, but the results with respect to the $21,612,000 claim of the Old Colony bonds would be similar (see VI, above).

Prior to its lease to New Haven in 1893, Old Colony was an operating railroad, conservatively capitalized and pro-

[88] 318 U.S. 523, 571, 87 L. ed. 959, 1010 (1943).

[89] Consolidated Rock Products Co. v. DuBois, 312 U.S. 510, 523-524, 85 L. ed. 982, 992 (1941).

gressively managed, with connecting outlets to the west and north *via* the Boston & Maine system and the Boston & Albany, as well as to the south *via* the New Haven, and with a profitable connection with New York City through its own subsidiary steamship line, so that it was in no way dependent on the New Haven. During the period of the lease the Old Colony lost its operating organization, its equipment, its steamship line and its own terminals in Boston.[90]

The application of the *Consolidated Rock Products* doctrine to a situation like Old Colony's has not been settled by this Court, but should be, in the interest of efficient administration of railroad reorganizations under the Bankruptcy Act.

VIII. *Question 8* presents the question whether the Commission, in its Sixth Supplemental Report and Order with respect to the plan of reorganization of the Old Colony, exercised its own independent judgment in establishing the value of the Old Colony assets to be sold to the reorganized New Haven, and the price to be paid therefor.

(*a*) That it did not exercise its independent judgment is crushingly demonstrated in the last portion of the dissenting opinion [91] in the Circuit Court of Appeals below. On Judge Frank's argument on this point your petitioners rely.

It must be taken into account that, when the same provisions of the plan were earlier before the Circuit Court of Appeals, that Court ordered the Old Colony portions of the plan remanded to the Commission because, in the judg-

[90] Commissioner Eastman's dissent to Original Report of the Commission, 239 I.C.C. 337, 446, 447 (1940), Prior S.C. R., vol. A, Ex. 1, pp. 7863, 7994; and (First) Supplemental Report, 244 I.C.C. 239, 258, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8061-8062.

[91] F. 2d, , Stip. R. I, No. 15, p. 12708.

ment of the Circuit Court of Appeals, the Commission had approved the plan in its Fifth Supplemental Report and Order "for fear that any material modification of it [the compromise of the Joint Report] would be unacceptable to the parties and would result in delay in consummation of the reorganization." The Circuit Court of Appeals therefore directed [92] the Commission to make its own independent findings of value and price, *and to state its reasons therefor* as required by Section 77(d).

(*b*) Even if the Commission had not to overcome, as argued in the dissenting opinion in the Circuit Court of Appeals below, the onus of approving again the exact valuation figure which it had previously approved for legally improper reasons, the Commission's Sixth Report [93] is so confused that it is impossible in many respects to find a statement of its reasons for approving the plan a second time, or to determine whether it applied proper legal standards or not.

In sum, we submit that the Sixth Report, when read in the light of the prior Reports on the same plan, shows on its face that the approval of the plan as to Old Colony was arrived at capriciously and arbitrarily; and also that the Sixth Report is so deficient in its statement of reasons for the Commission's conclusions, required by Section 77(d), as to afford no adequate basis for determining whether or not proper legal standards were in all respects observed. The remarks of this Court in the early *Milwaukee* decision [94] are equally applicable here: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

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[92] 147 F. 2d, 40, 49.

[93] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

[94] United States v. Chicago, Milwaukee, St. P. & P. R. Co., 294 U.S. 499, 510-511, 79 L. ed. 1023, 1031 (1935).

IX. *Question 9* makes the point that the Commission in its valuation of the Old Colony assets to be acquired by New Haven under the plan completely ignored a cash deposit claimed by Old Colony, representing interest paid on $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; and also that the District Court has never adjudicated Old Colony's right to this asset, amounting to $792,000 at December 31, 1943 (and since increased to over $1,000,000), but has kept these interest payments impounded in a special bank account "pending further order of this court." [95]

Until the Old Colony's title to this cash deposit is adjudicated, no plan which omits it as an Old Colony asset can comply with the proper legal standards. This Court has remanded plans of reorganization to the District Court for similar deficiencies—as in the *Consolidated Rock Products* case,[96] for determination of what assets were subject to the subsidiary debtors' mortgages, and in the *Milwaukee* case,[97] for the determination of the lien of the General Mortgage bonds on the "pieces of lines east." In the latter decision, at p. 569: ". . . the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

The detailed proof, from the Sixth Supplemental Report itself, that the Commission entirely failed to credit the Old Colony with this asset of interest on deposit is set forth in your petitioners' Brief (page 9) on this question.

In conclusion, this Court should consider (1) whether the Commission in its valuation of Old Colony assets to be acquired by New Haven completely omitted this substan-

[95] Stip. R. I, No. 11, pp. 11891, 11895-11896.
[96] 312 U.S. 510, 520, 85 L. ed. 982, 990.
[97] 318 U.S. 523, 568-569, 87 L. ed. 959, 1009.

tial asset of cash interest on deposit, and consequently understated the equivalent price for the Old Colony properties, thereby rendering the plan unfair and inequitable with respect to Old Colony; and (2) whether the validity and amount of the Old Colony's claim to interest on these New Haven bonds must not be determined by the District Court before the Commission can properly propose a plan. On either basis, the plan must be returned to the District Court and the Commission.

X. *Question 10* points out a second instance of improper valuation of the Old Colony assets by the Commission, which can be demonstrated on the face of the record in the Sixth Supplemental Report.[98]

The rather involved facts in the record on which this question is based are set forth in your petitioners' Brief on this question, where it is demonstrated, from the Sixth Supplemental Report itself, that the Commission erroneously applied some $10,100,000 too much in reduction of the Old Colony's lease claim. The District Court conceded [99] that the Commission applied improper legal standards in so doing, if it made a reduction in that excessive amount, but the judge misinterpreted the language of the Sixth Report, as did the Circuit Court of Appeals, in finding that the Commission had not done so. The statements showing the error on the face of the Report are plain to see, as your petitioners' Brief (page 17) points out.

XI. *Question 11* raises another question as to the proper performance of its functions by the Commission in its Sixth Supplemental Report.

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[98] 261 I.C.C. 195, Stip. R. I, No. 3, pp. 11682, 11695, 11698.
[99] Stip. R. I, No. 11, pp. 11891, 11894.

The plan with respect to Old Colony provides for cancellation of the New Haven's prior lien claim of some $10,500,000 against the Old Colony before payment for the Old Colony's remaining assets. The Sixth Report says:[100] "Thus, in effect, the prior-lien claim is to be considered part of the purchase price of Old Colony properties and assets, as also are the cash requirements to discharge claims against Old Colony." The Report then specifies, as items to be applied to payment of the prior lien claim, certain specific Old Colony assets or the new securities distributable for such particular assets under the plan.

Since the claim of $10,500,000 is a claim for cash, it is essential that the assets used in payment be given cash values. The Commission failed to make any finding of its own as to such cash or probable market values of the new securities to be used in payment of the prior lien claim, but instead used (without itself adopting) certain market values of such new securities estimated or guessed at by a single witness in February, 1942.[101] See Judge Frank's dissenting opinion in the Circuit Court of Appeals below,[102] discussing, though in a different connection, the necessity of a Commission finding of market values.

Further, the probable market values required for the plan should have been found by the Commission as of December 31, 1943, the valuation date for the Old Colony reorganization. Nearly two years intervened between the "expert" testimony on market values and the proper cut-off date, during which period prices of railroad securities rose substantially. Proper finding by the Commission of the probable market values as of December 31, 1943, would have reduced substantially the assets required for payment

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[100] 261 I.C.C. 195, 207, Stip. R. No. 3, pp. 11682, 11698.

[101] *The entire testimony on such values is set forth in* Stip. R. II, No. 29, pp. 107-111.

[102] F. 2d, , Stip. R. I, No. 15, pp. 12722-12725.

of the prior lien claim, and would have correspondingly increased the new securities distributable to the Old Colony bondholders. See your petitioners' Brief on this question (page 22).

In conclusion, this Court in the interest of the application of proper legal standards in Section 77 proceedings should determine whether the Commission failed to make its own independent findings of the essential probable market values, as of December 31, 1943, of the new securities applied to the satisfaction of the prior lien claim against Old Colony; and whether, if such findings were made by implication, they were based on evidence so meager and so out-of-date as to be unsupported by sufficient evidence.

XII. *Question 12* involves the proper construction of the following provision of Section 77(d):

> "Such plans [of reorganization] may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors . . . , or by or on behalf of any class of stockholders . . . , or with the consent of the Commission by any party in interest. *After the filing of such a plan,* the Commission . . . shall, after due notice to all stockholders and creditors given in such manner as it shall determine, *hold public hearings,* at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order . . ." (Emphasis supplied.)

The courts below appear to have sanctioned, in this instance, a departure from the accepted and usual, and the proper, course of procedure.

At the conclusion of its final hearings on this plan in February, 1942, the Commission's examiner [103] held open the record for the reception of the Joint Report and briefs, but held no further hearings. Since the Joint Report [104] contained substantially all the provisions of the plan for reorganization of Old Colony, including proposals on valuation of and price for its assets which had never been proposed before, and the Commission adopted the Joint Report plan, in substance, in its Third, Fourth, Fifth and Sixth Supplemental Reports,[105] a question, of great importance to the Old Colony bondholders at least, is raised as to whether the above-quoted provision of the statute did not require the Commission to reopen its hearings after receipt of the Joint Report.

On the latter point, the two sentences of Section 77(d) quoted above require interpretation, since the first sentence permits filing of a plan *during* a hearing (but only with the Commission's consent), while the second sentence requires a hearing *after* a plan has been filed. To give effect to both sentences would seem to require that, in case a plan is filed *during* a hearing, the hearing be continued *after* the plan is so filed. In the present case, by holding open the record after the hearings ended, the Commission may technically have arranged for the Joint Report plan to be filed "during" the hearing; but granting two weeks thereafter to file briefs was not the equivalent of giving a "hearing" *after* that plan was filed.

An opportunity to file briefs after the Joint Report was submitted was not the equivalent of a "hearing." *Mor-*

[103] Third Supplemental Report, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9754.

[104] Stip. R. II, No. 36, p. 133.

[105] (Third) 254 I.C.C. 63 (1942); (Fourth) 254 I.C.C. 405 (1943); (Fifth) 257 I.C.C. 9 (1944); (Sixth) 261 I.C.C. 195 (1945)—(Third, Fourth) Prior S.C. R., vol. A, Exs. 8 and 9; (Fifth, Sixth) Stip. R. I, No. 1, p. 10831; and No. 3, p. 11682.

gan v. *United States,* 298 U.S. 468, 480. *Morgan* v. *United States,* 304 U.S. 1, 18. Here, there was no opportunity to submit evidence, to cross-examine the proponents of the Joint Report plan or to argue orally on the merits of the proposed price for the Old Colony first put forward in the Joint Report. This Court should determine what constitutes a "hearing" under the provisions of Section 77(d).

XIII. *Question 13* involves the construction of the following provision in Section 77(d):

> "After the filing of such a plan, the Commission . . . *shall* . . . *hold public hearings,* at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, . . . or . . . refuse to approve any plan." (Emphasis supplied.)

In that connection, the following provisions of Section 77(e) are also pertinent:

> "If the judge shall not approve the plan, . . . he shall enter an order in which he may either dismiss the proceedings, or . . . refer the proceedings back to the Commission for further action . . . If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section."

The question here is whether this first quoted provision applies when a District Court order approving a plan has been affirmed in part but reversed in part with instructions that the whole plan or a specified part be remanded to the Commission for further action. In the Old Colony

case, upon partial reversal the District Court remanded the entire plan to the Commission but limited the purposes for which it was returned to the independent valuation of the Old Colony assets and the price therefor, the most important elements of the plan as to Old Colony. The Commission denied the petition of your petitioners here for public hearings, and held no hearings prior to making its Sixth Supplemental Report and Order.

The question here was not raised in or decided by *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 145 F. 2d, 299.[106] Following this Court's previous decision [107] in the same reorganization, reversing in two particulars the order approving the plan, the plan was remanded to the Commission, which *did then hold hearings* and receive evidence with respect to those particulars of the plan (see 58 F. Supp. 384, 387), as your petitioners here contend the Commission should have done in the Old Colony case. (The questions raised in the later *Milwaukee* decision, 145 F. 2d, 299, were quite different, being concerned with the Commission's authority to change the plan in other respects, and its refusal to hear evidence offered to show subsequent changes in the debtor's economic situation.)

In the interest of efficient administration of many cases under Section 77, it is of importance that the effect of a partial reversal of an order approving a plan, and of partial remand of a plan to the Commission, and the application to such situation of subsections (d) and (e), be settled by this Court, and that an improper departure by the Commission from its own practices as to hearings (see the procedure reported in the District Court opinion, 58 F. Supp. 384, 387, cited above) should not be sanctioned by the lower Courts as in this case.

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[106] *Cert. denied*, 324 U.S. 857, 89 L. ed. 1415; *rehearing denied*, 325 U.S. 895, 89 L. ed. 2006.

[107] 318 U.S. 523, 87 L. ed. 959.

XIV. *Question 14* invites consideration of whether bondholders can be held not reasonably justified in rejecting a plan, where the plan had not been validly approved by the Commission and therefore could not have been validly approved by the District Court. This is a question of general importance to the proper administration of railroad reorganizations under Section 77 which has not been, but should be, settled by this Court.

This question is of importance here because, although the Commission subsequently approved the identical plan again in its Sixth Report of May 15, 1945, such plan was not subsequently submitted to creditors for acceptance or rejection (see Question 15 herein). When the plan was submitted in 1944, after the Fifth Report, it was presented to creditors supported by the Third, Fourth and Fifth Reports, which the Circuit Court of Appeals later held [108] to be defective because, on their face, it appeared that the Commission had not exercised its independent judgment as to the value or price of Old Colony.

XV. *Question 15* raises a question of importance to the fair and efficient administration of reorganizations under Section 77 which has not been, but should be settled by this Court.

The provisions of the plan of reorganization (in the Fourth and Fifth Reports) relating to the valuation of and price for the Old Colony assets were remanded to the Commission by the Circuit Court [109] in order that the Commission might exercise its independent judgment thereon and state its reasons. This involved reversing, in that respect, the previous order (No. 734)[110] of the District

[108] 147 F. 2d, 40.
[109] 147 F. 2d, 40.
[110] Stip. R. II, No. 21, p. 11.

Court approving the plan. As is pointed out in our Brief (page 37), the defect in the plan on which the reversal was based was fundamental and far-reaching; it cannot be belittled by terming it "a formal defect" as does the Circuit Court of Appeals below.[111] But the plan which was remanded was the plan which had previously been submitted to the creditors for acceptance or rejection, and, when so submitted, was *rejected* by a majority of the Old Colony bonds voting thereon.

When the same plan was again reported by the Commission in its Sixth Supplemental Report, the District Court attempted to short cut the statutory procedure by (Order No. 821)[112] "enlarging the record" to include that Report and by "reinstating" its previous Order No. 734 approving the plan submitted in the Fourth and Fifth Reports, thus avoiding approving the plan specifically. The Court thereupon also entered Order No. 822[113] confirming the plan.

It should be determined, therefore, by this Court whether the plan as to Old Colony was not required to be resubmitted to the Old Colony bondholders, if not to the New Haven creditors also, for acceptance or rejection *before* confirmation of the plan by Order No. 822. In effect, the lower Courts sanctioned a departure from the statutory procedure, and what should be the usual course of procedure, which should be examined by this Court.

XVI. *Question 16* raises a question which has never been decided by this Court, and should be settled in the interests of efficient administration of railroad reorganizations: Can a plan be "crammed down" the creditors of

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111 F. 2d, , Stip. R. I, No. 15, pp. 12655, 12672.
112 Stip. R. I, No. 12, p. 11922.
113 Stip. R. I, No. 13, p. 11924.

a debtor if a voting majority of *the only class* of creditors affected by the plan have rejected it?

The provision of Section 77(e) referred to as the "cram down" provision is as follows:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, [and similarly as to stockholders] . . . : *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): . . ."

The plan [114] under consideration is a plan of reorganization for the Old Colony, debtor, as well as a plan of reorganization for the New Haven, debtor, and this is recognized in the plan itself by the several provisions (Section N, subsections (1)(c) and (2)(c), and Section U (3)) for severance of the two plans, permitting the consummation of the plan as to New Haven, while postponing the reorganization of Old Colony to a future plan. The Old Col-

[114] Stip. R. I, No. 1, pp. 10871, 10908, 10922.

ony is and always has been a separate entity, with its own creditors, and can be covered by the same plan which covers the New Haven only because the New Haven owns a majority (but not all) of its capital stock and, under the statute, it could therefore be brought in for reorganization "in connection with, or as a part of a plan for reorganization" of the New Haven. Frank, J., dissenting in the Circuit Court of Appeals below.[115]

We submit that the statutory provision quoted above, which goes beyond the powers granted in any previous bankruptcy law or exercised in any equity receivership proceedings, was intended to promote the public interest in the railroad business by preventing a *minority* from "holding up" a reorganization approved by the public authorities and by a majority of persons interested. This is emphasized by the provisions for voting of creditors and stockholders by classes. The provision was never intended to authorize forcing (as here) a *sale* of its properties upon a railroad against the will of a *majority* of its owners acting on the question. In that case the moral, equitable and practical aspects of policy weigh *against* the exercise of compulsion.

In the report [116] of Joseph B. Eastman as Federal Coordinator of Transportation, which initiated the proposals which resulted in the amendment of Section 77 in 1935, Mr. Eastman said with regard to the "cram down" provision which he then proposed:

> "Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it be-

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115 F. 2d, , Stip. R. I, No. 15, pp. 12692-12697.

116 Reports of Committees, etc., 74th Congress, 1st Session, v. 8, p. 9920; H. Doc. 89; quoted in Record of Hearing before Committee on the Judiciary, House of Representatives, 74th Congress, 1st Session, on H.R. 6249 (proposed revision of Section 77 of Bankruptcy Act), April 15, 1935, p. 22.

> lieved that the courts will override strong dissents by any large number of such classes, or by a single large class, excepting where it is established that they have no interest in the property."

Nor is delay to the consummation of the reorganization of the New Haven an excuse for forcing the plan upon the Old Colony bondholders. The plan itself, in Section U(3), provides that the District Judge may eliminate the Old Colony from reorganization under the present plan, if in his judgment the opposition of the Old Colony bondholders will unreasonably and unnecessarily delay reorganization of the New Haven.

In the present case it must be realized that the abandonment of operation of the Old Colony lines may *not* be the only alternative to acquisition by the New Haven. Acquisition and operation of Old Colony lines by the Boston & Maine or the Boston & Albany, with both of which lines it now connects, might prove equally beneficial to the public as well as more advantageous to the bondholders.[117] If the Old Colony were reorganized apart from the New Haven, either of those railroads might compete with New Haven for the right to acquire the Old Colony lines.

If the "cram down" provision of Section 77(e) were construed to authorize the Court to overrule the rejection of the Old Colony plan by a voting majority of the only class of creditors affected by it, it would, we submit, present a constitutional question: whether the bankruptcy powers of Congress can lawfully go to such lengths, and whether the provision, so construed, would not deprive the Old Colony of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

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[117] 244 I.C.C. 239, 258, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8062.

This Court in the recent *Rio Grande* decision [118] upheld generally the constitutionality of the "cram down" provisions of Section 77(e), but the situation to which the provision was there applied was entirely different from the present case. In the *Rio Grande* case the general mortgage bonds which rejected the plan were only one of many classes of creditors of the principal debtor, constituted only approximately one-fourth of the total debt, and were the most junior class participating in the plan.[119] The language of this Court's decision must be limited in scope to the type of situation before the Court. The Court has therefore not decided the constitutional question as to the application of the provision (*i*) to a class of creditors like the Old Colony bonds, which are senior secured creditors of Old Colony and the only class of its creditors participating in the plan (other than the prior lien claim which is provided for by full cash equivalent); or (*ii*) to forcing a sale of all its assets upon an independent railroad, a procedure the opposite of a sale at a "fair upset price."

It is clear that the bankruptcy powers of Congress are subject to the Fifth Amendment. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589, 79 L. ed. 1593, 1604 (1935). To cram down on the adverse voting majority of the only class of creditors of the debtor is not merely an extension of the recognized principles of compositions in bankruptcy, it is *different in kind*. The Old Colony bondholders, as secured creditors and as the only class of creditors, with a voting majority against the plan, are in a position not dissimilar to that of the single mortgagee, of which Mr. Justice Brandeis in the above-cited case said (at pp. 585-586):

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[118] Reconstruction Finance Corp. v. Denver & Rio Grande W. R. Co., U.S. , 90 L. ed. 1134, 1154 (decided June 10, 1946).

[119] *In re* Denver & Rio Grande W. R. Co., 62 Fed. Supp. 384, 386, 389 (1944).

> "In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor."

It is true that by almost imperceptible steps [120] this Court has since gone far beyond some of the restrictions on bankruptcy powers over objectors laid down in the *Radford* case, but the foundation of such powers is still the principle of the composition, which apply only to a minority. To impose a settlement on a majority of the debtor's creditors is a violation of due process of law, as well as inconsistent with the provisions of Section 77(e) requiring submission of plans to creditors for acceptance or rejection.

XVII. *Question 17* comprehends the errors of the Courts below with respect to matters raised by Questions 1 to 16, inclusive.

The District Court, in entering its Orders No. 821 with respect to approval of the plan and No. 822 confirming the plan, and the Circuit Court of Appeals for the Second Circuit, in sustaining by a majority of the Court the said orders of the District Court, dealt with questions of interpretation of Section 77 of the Bankruptcy Act which are of general importance to the efficient management of railroad reorganizations under that Federal statute and which have not been but should be considered and settled by this Court; have decided Federal questions probably in conflict with decisions of other Circuit Courts of Appeals or

[120] *As in* Wright v. Union Cent. L. Ins. Co., 311 U.S. 273, 278, 85 L. ed. 184, 186 (1940); *rehearing denied*, 312 U.S. 711, 85 L. ed. 1142.

with decisions of this Court; have so far sanctioned departures from the proper accepted and usual course of judicial and quasi-judicial proceedings as to call for the exercise of this Court's powers of supervision; and have taken or sustained action by the District Court and by the Interstate Commerce Commission in matters vitally affecting the petitioners, in violation of said statute and of the constitutional protection of due process of law.

Conclusion.

Wherefore your petitioners respectfully pray that this petition be sustained and granted, and that a writ of certiorari issue in said cause, as provided by law, to the end that said cause may be reviewed and determined by this Court; and that upon final hearing the judgment of the Circuit Court of Appeals be reversed, with instructions to such appellate Court to cause this cause to be remanded to the District Court for such action as may be required by the mandate of this Court; and the petitioners pray for all other proper relief.

PROTECTIVE COMMITTEE FOR BONDS OF
OLD COLONY RAILROAD COMPANY,
Petitioners,

By JOSEPH B. ELY,
Counsel for said Petitioners.

ELY, BRADFORD, BARTLETT, THOMPSON & BROWN,
WILDER H. HAINES,
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No. 1368

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, *Petitioners*,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS., *Respondents*.

BRIEF OF THE PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF THE PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

This is a Petition for a Writ of Certiorari for review of the judgment of the United States Circuit Court of Appeals of the Second Circuit affirming orders of the United States District Court for the District of Connecticut in the above-entitled matter.

The matters involved and the questions raised are set forth in the accompanying Petition, to which reference is made, in order to avoid duplication of material in this brief.

This brief is for the purpose of setting forth in more detail the significance of certain of the questions raised in the Petition, the reasons why this Court should undertake to consider them after hearing argument on the merits, and your petitioners' position with respect to the issues involved.

Omission of discussion of some of the questions stated in the Petition is not to be taken as a waiver of such questions, or as indicating that they are unimportant. Discussion of such questions is omitted here for the sake of brevity, because it is believed their significance is fully brought out in the Petition and (in some cases) in the dissenting opinion filed in the Circuit Court below and cited in the Petition.

The Course of the Proceedings.

The course of the proceedings for the reorganization of the New Haven and the Old Colony Railroads is outlined in the Petition (p. 4).

Of the eleven and one-half years since the New Haven reorganization began, four and one-half years elapsed before the first plan of reorganization was put forth in March, 1940, by the Commission. This plan, as revised in February, 1941, the Court disapproved in December, 1941, ending the first phase of over six years. When a fresh start was made, the Court and the Commission embarked on a series of "short-cuts" which have only prolonged the proceedings. As Judge Frank, dissenting in the Circuit Court below, says:[1] "The trouble began when the Com-

[1] Stip. R. I, No. 15, p. 12710.

mission's so-called First Supplemental Report, of February 18, 1941, came before the district judge . . . The district judge . . . remanded the plan to the I. C. C. But, before he did so, the judge—saying, in his (unreported) opinion of September 19, 1941,[1a] that the usual procedure (explicitly prescribed by the statute) for Commission valuation, would undesirably delay reorganization—appointed a 'compromise' committee . . ."

Then came the "compromise report" and then the "Joint Report",[2] and the Commission, swayed by pressure for "compromise," adopted the compromise provisions as to Old Colony valuation and price in its Third,[3] Fourth[4] and Fifth[5] Supplemental Reports. This Committee, your petitioners, first organized in June, 1941, was justified in its appeal from approval of that plan, when the Circuit Court of Appeals reversed[6] the approval and returned the plan to the Commission in order that it might exercise its independent judgment on the Old Colony valuation and price, and state its reasons for its conclusions.

The Sixth Supplemental Report now presents the identical Old Colony valuation and price held to have been previously adopted by the Commission because the terms were supposed to be a "compromise." Judge Frank, in his dissent below,[7] has dissected the Commission's explanation of this coincidence. Your petitioners must once more raise on appeal the questions of conformity to proper

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[1a] Correct date December 8, 1941. See Prior S.C. R., vol. A, Ex. 6, p. 8922a.

[2] Stip. R. II, No. 36, p. 133.

[3] 254 I.C.C. 63, 96 (1942), Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9797.

[4] 254 I.C.C. 405, 422 (1943), Prior S.C. R., vol. A, Ex. 9, pp. 10123, 10155.

[5] 257 I.C.C. 9, 16 (1944), Stip. R. I, No. 1, pp. 10831, 10843.

[6] 147 F. 2d, 40; *see also* 150 F. 2d, 169.

[7] Stip. R. I, No. 15, pp. 12708-12734.

legal standards. If the consequent delay to the reorganization since the District Court confirmed the plan on September 6, 1945, must be charged to them, they believe the questions raised by this Petition are of such moment, not only in this case but to the proper and efficient administration of railroad reorganizations generally, that they have no choice but to accept the responsibility, and to proceed, with the indulgence of this Court.

> "There can be considerations more imperative than the dispatch of judicial business, even after delays so long extended in this case. If the legally protected interests of any opposing parties are fully preserved, it is not a good reason to deny others any reasonable chances to protect their own interests that they have been long in asserting them." Learned Hand, J., in *Knight* v. *Wertheim,* 158 F. 2d,—(cited by Frankfurter, J., dissenting in *Insurance Group Committee* v. *Denver & Rio Grande W. R. Co.*, —U.S.—, 15 Law Week, 4189, 4195, February 3, 1947).

See also Frank, J., dissenting opinion below (Stip. R. I, No. 15, p. 12700, note 7, and pp. 12733-4, last paragraph of note 89).

Argument as to Certain Questions in the Petition.

As to Question 6 in the Petition.

(See pages 31 and 46 of the Petition.)

Question 6 raises the question of an inconsistency in the plan of reorganization, if the Old Colony properties are, as the Circuit Court majority hold, on the footing of a division of the New Haven and the Old Colony bonds are treated as a divisional lien of New Haven. On that basis the claim

of the Old Colony bonds against the New Haven estate would consist of the total principal plus accrued and unpaid interest to the valuation date, which has been treated as December 31, 1943, for Old Colony.

The Commission in its (First) Supplemental Report [8] established the amount of the Old Colony bonds claim as of December 31, 1939, as $16,448,000 face amount plus unpaid interest to that date to make a total claim of $19,655,683. We compute the additional interest to December 31, 1943, to make the total claim of the Old Colony bonds approximately $21,612,000.

If it is assumed that the Commission in its Sixth Supplemental Report established the "price" of the Old Colony assets at $18,196,000, consisting of $4,398,305 face amount of new fixed-interest bonds, $3,298,728 face amount of new income bonds, and cancellation of the New Haven prior lien claim of $10,494,000, it nevertheless has not established the "deficiency" of the mortgage security for the bonds, since some of the assets included in establishing the "price" above may not be under the bond mortgage.

Furthermore, even if it is assumed that all the assets valued by the Commission are mortgage security for the Old Colony bonds, thus establishing a deficiency of $3,416,000 in security for the Old Colony bonds (claim of $21,612,000, less assets valued at $18,196,000), the Old Colony bonds (as a divisional lien) would be entitled to participate as an unsecured claim to the extent of that deficiency at least. The plan makes no provision for such participation of the Old Colony bonds as unsecured creditors to that extent, and the total compensation awarded by the Commission to these bonds did not take any such unsecured claim into account, so far as appears in the

[8] 244 I.C.C. 239, 267 (1941), Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072.

Commission's Reports on the plan. See *Consolidated Rock Products Co.* v. *Du Bois,* 312 U.S. 510, at 527.

The uncompensated deficiency of the Old Colony bond claim is, however, much greater than $3,416,000. Even if the prior lien claim of $10,494,000 is properly a charge against the Old Colony "division" (contrary to the point made in V of the Petition), it is necessarily a lien imposed on the Old Colony *assets,* and thereby reduces the *assets securing* the bonds; but it does not decrease the *claim* represented by the bonds. The Commission has set a "price" of $7,697,033 face amount of new securities for the Old Colony assets after satisfaction of the $10,494,000 prior lien claim. The Old Colony bonds would therefore be unsecured by the difference between the face of the claim, $21,612,000, and the security of $7,697,033. The deficiency of $13,914,967 is not compensated by the present plan, on the "divisional lien" basis, and should be entitled to participate with other New Haven unsecured creditors.

The Old Colony bonds are in a worse position under the plan than other divisional first mortgage bonds of the New Haven, and than were the General Mortgage bonds in the *Milwaukee* case,[9] in that the Old Colony bonds do not receive even a face amount of securities equal to the face amount of their claim, principal and interest, despite the participation of unsecured creditors of the New Haven in the plan. In the Circuit Court below, the New Haven parties argued (see dissenting opinion, p. 12698) that "the provisions in the plan relating to the Old Colony are upon the same footing as those relating to the Housatonics, the New Englands, and the various other divisional liens" of New Haven, and the Circuit Court majority apparently

[9] Institutional Investors v. Chicago, Milwaukee, St. P. & P. R. Co., 318 U.S. 523, 87 L. ed. 959.

adopted this view. But the divisional bond liens designated as the Housatonics and New Englands receive, under the plan, the full face amounts of their claims, principal and interest, in new first and refunding (fixed interest) bonds.[10]

In the *Milwaukee* case (p. 571) this Court directed the District Court to "determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." The Old Colony bonds assuredly do not receive under the plan any *other* form of compensation for the loss of their senior rights. Neither the Commission nor the District Court discusses compensatory treatment on the basis of the face amount of the Old Colony bond claim, as they failed to do in the *Milwaukee* case also (p. 571).

For these reasons also, if the divisional lien theory is allowed to stand, the plan is unfair, inequitable and discriminatory as to the Old Colony. This Court, we submit, should enforce the application of proper legal standards in that respect.

As to Question 8 in the Petition.

(See pages 32 and 48 of the Petition.)

Question 8 presents the question whether the Commission, in its Sixth Supplemental Report and Order with respect to the plan of reorganization of the Old Colony, exercised its own independent judgment in establishing the value of the Old Colony assets to be sold to the reorganized New Haven, and the price to be paid therefor.

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[10] Appendix A to Fifth Supplemental Report, 257 I.C.C. 9, 29, Stip. R. I, No. 1, pp. 10831, 10867-10868.

That the Sixth Report, in its determination of the price for the Old Colony at exactly the same figures set in the Fifth Report (which the Circuit Court of Appeals held did not represent the Commission's independent judgment), was "capricious and arbitrary," your petitioners can add little to the argument presented in Judge Frank's dissenting opinion in the Circuit Court below.[11]

Your petitioners, however, wish to point out further that, even if the Commission had not to overcome (as Judge Frank demonstrated) the onus of approving again the exact valuation figure which it had previously approved for legally improper reasons, the Commission's Sixth Report is so confused that it is in large measure impossible to find *a statement of its reasons* for approving the plan a second time, or to determine whether it applied proper legal standards or not.

The District Judge had his difficulties in figuring out on what the Commission based its conclusions, and was driven to making a calculation of his own "by assigning . . . a *hypothetical* value not *inconsistent* with the tenor of the Report."[12] (Emphasis supplied.) His calculation was appended[13] under the title "A Permissible Valuation of Old Colony," but unfortunately, as your petitioners demonstrate elsewhere, some of the figures he used *are* inconsistent with values which the Commission indicated it was using. However, the fact that the Court was driven to computing how the Commission's conclusions *might* be supported by "hypothetical" values, in order to justify confirmation of the Commission's plan, indicates the inadequacy of the Commission's statement of its reasons for proposing the plan as to Old Colony.

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[11] Stip. R. I, No. 15, pp. 12708-12734.
[12] Stip. R. I, No. 11, p. 11898.
[13] Stip. R. I, No. 11, p. 11915.

The opinions[14] of the majority of the Circuit Court confirm this:

Judge Swan (at p. 12665): ". . . indeed, we cannot say anything about how it did appraise them, for the Report does not disclose its method." (At p. 12668): "The Report does not expressly mention this item of interest . . . Judge Hincks *assumed* it to be an asset belonging to Old Colony and *construed* the Commission's Report to have treated it 'as an unliquidated claim . . . reflected in its comprehensive valuation . . .'." (At p. 12670): "The Commission merely considered the possibility of deducting the full *ad damnum* (of the Bankers Trust claim), it *did not say that it did* value the breach of lease claim on that basis."

Judge Hand (at p. 12688): "It must be possible somewhere in the record to learn at what amounts the Commission did take the face of the claims, before we can know whether it remained within its jurisdiction; the possibility that it did so, is not enough. Nevertheless, in spite of this *formal* inadequacy, I think there is enough in the record to affirm the order, though I must own that I should have welcomed a clearer declaration in the report." (At p. 12688): ". . . the settlement figure—$3,250,000—which incidentally is *one of the few details, if not the only one* on which the Commission has seen fit to commit itself." (At p. 12689): ". . . but that, *like almost everything else* in the report, was *merely a discussion* of one of the various hypotheses, which *might* justify the final result . . . " (At p. 12690): "I regret that in the form which the case comes before us, we should have to *spell out the actual decision* by such roundabout methods, when it would have indeed been possible to make our path

[14] Stip. R. I, No. 15, pp. 12655, 12686.

> easy by categorical findings. However, since, for the reasons I have tried to give, it appears to me that the Commission kept within the limit of its jurisdiction, I conceive that we have no reason for further prolonging a litigation . . ." (Emphasis supplied.)

Why the Commission avoided making Judge Hand's path easy by categorical findings is explained by Judge Frank in his dissent.

In sum, we submit that the Sixth Report, when read in the light of the prior Reports on the same plan, shows on its face that the approval of the plan as to Old Colony was arrived at capriciously and arbitrarily; and also that the Sixth Report is so deficient in its statement of reasons for the Commission's conclusions, required by Section 77(d), as to afford no adequate basis for determining whether or not proper legal standards were in all respects observed. The remarks of this Court in the early *Milwaukee* decision, 294 U.S. at pp. 510-511, are equally applicable here.

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. Beaumont, S. L. & W. R.

Co. v. United States, 282 U. S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1; Florida v. United States, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U.S. 499, 79 L. ed. 1023 (1935).

As to Question 9 in the Petition.

(See pages 32 and 50 of the Petition.)

Question 9 makes the point that the Commission in its valuation of the Old Colony assets to be acquired by New Haven under the plan completely ignored a cash deposit claimed by Old Colony, representing interest paid on $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; and also that the District Court has never adjudicated Old Colony's right to this asset, but has kept these interest payments impounded in a special bank account "pending further order of this court." [15]

Until the Old Colony's title to this cash deposit is adjudicated, no plan which omits it as an Old Colony asset can comply with the proper legal standards. This Court has remanded plans of reorganization to the District Court for similar deficiencies.

See—

Consolidated Rock Products Co. v. *Du Bois*, 312 U.S. 510, 520, 85 L. ed. 982, 990;

Group of Institutional Investors v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523, 568-569, 87 L. ed. 959, 1009—

cited in the Petition on this point.

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[15] Stip. R. I, No. 11, pp. 11895-11896.

When the present plan came up for confirmation, the District Court became tardily aware of its default in this respect,[16] but seemed of the opinion that the Commission could remedy, and had remedied, the lack of adjudication, despite the fact that the Sixth Report makes no reference whatever to this interest cash fund. The District Court says:[17] ". . . I can only *infer* that the Commission treated this item, like the claim against Bankers Trust Company, as an *unliquidated* claim the proper value of which in its independent judgment was duly reflected in its comprehensive valuation of all Old Colony assets." (Emphasis supplied.)

Your petitioners submit, first, that this cash deposit was not in any true sense an *unliquidated* claim; the question, if any, was actually one of title: Was the Old Colony entitled to the cash interest on deposit pending further order of the Court, or not? and, second, that the determination of title and of the liquidated amount of the claim must be made by the Court and not the Commission. See Judge Hand's discussion of this point with respect to this and other claims of Old Colony, in the Circuit Court of Appeals below:[18] "I cannot divorce the three items here in controversy, in their aspect as assets of Old Colony, from their aspect as claims against New Haven, and in that aspect Hincks, J., had exclusive jurisdiction to determine their validity and amount; although only the Commission might set their value, when so liquidated, in terms of new securities." As to this interest item, its "value" is the same as its "amount," since it consists of a cash bank deposit in the hands of the Court.

Whatever the Commission might or might not have done, within its lawful scope, your petitioners will point

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[16] *Op. cit.*, 11895-11897.
[17] *Op. cit.*, 11897.
[18] Stip. R. I, No. 15, p. 12687.

out what it did do in approving the plan of reorganization: It completely omitted to take into account, as an Old Colony asset, cash interest on deposit to the extent of $792,000 (or, at the least, $640,000) up to June 30, 1943, or $1,080,000 at August 31, 1945.

Appendix A[19] attached to the Fifth Supplemental Report lists these New Haven bonds owned by Old Colony in the table showing distribution of reorganization securities under the plan, stating face amount $3,600,000, interest accrued from June 2, 1936, *to June 30, 1943,* $379,200, or a total claim of $3,979,000. In footnote 1 it is explained that the interest figure represents the balance *after deduction* of interest payments of $792,000 (May 13, 1935, to November 13, 1940) impounded in a special account by order of the District Court, of which amount $640,000 represents interest from June 2, 1936 (the date of rejection of the Old Colony lease), to November 13, 1940. Thus the total interest *accrued* plus interest *deposited* from May 13, 1935, *to June 30, 1943,* is $1,171,200, and from June 2, 1936 (date of rejection of Old Colony lease), to June 30, 1943, is $1,019,200. (We contend that the larger figure is the correct amount of the Old Colony interest claim.) Only $379,200 of either total was taken into account by the Commission, leaving $792,000 (or at least $640,000) unaccounted for.

Judge Hand, in the Circuit Court of Appeals below,[20] being unable to find any reference in the Sixth Report to this interest claim, falls back on the reference to it in Appendix A summarized above, and draws the conclusion that this reference indicates the Commission *must have* included the interest in applying these New Haven bonds to settlement of the prior lien claim. It can be mathematically demonstrated from the Sixth Report that the

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[19] 257 I.C.C. 9, 29, Stip. R. I, No. 1, pp. 10831, 10867-10868.
[20] Stip. R. I, No. 15, pp. 12689-12690.

Commission did not include $792,000 (or $640,000) of the deposited interest in its valuation of this asset.

The Sixth Report [21] states that for the $3,600,000 New Haven bonds Old Colony would be entitled to receive $1,227,411 face amount of new fixed interest bonds, $1,776,601 new income bonds and $975,188 par value of new preferred stock of New Haven, all of which, valued "upon the basis of the expert testimony of record," would be worth $2,010,347. But these face amounts of new securities are exactly those set forth in Appendix A as distributable on the principal of the bonds *plus only $379,200 accrued interest.* Therefore the $792,000 of cash interest is not taken into account, it being in a special account and *deducted* from the *total* accrued interest as explained in footnote 1 to Appendix A. This cash fund claimed by Old Colony has been entirely overlooked in computing the Old Colony assets.

This is further demonstrated when the Sixth Report [22] adds up the Old Colony assets, including these New Haven bonds, to be offset against the prior lien claim of $10,494,844.

The valuation of the Old Colony assets to be acquired by New Haven proceeds in the Sixth Report by two main steps: First, the payment of the New Haven's prior lien claim by Old Colony assets, and, second, the fixing of an over-all price in new securities for the remaining assets. Unlike the rest of the Report, the provisions are clear and specific as to what assets the Commission is applying to payment of the prior lien claim, and at what values; for the Commission lists them and sets down their total value. It says: [23]

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[21] 261 I.C.C. 195, 204-205, Stip. R. I, No. 3, pp. 11682, 11695.
[22] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[23] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.

"Under the plan approved by us the prior-lien claim of the principal debtor's trustees against Old Colony, and the claims of Old Colony against the principal debtor and the Bankers Trust Company are to be released and canceled. Thus, in effect, the prior-lien claim is to be considered part of the purchase price of Old Colony properties and assets, as also are the cash requirements to discharge claims against Old Colony. The total of these items is $10,494,844. Under the values *assigned* by us for (1) the Union Freight Railroad stock, (2) the suit against the Bankers Trust Company, (3) the reorganization securities allocable to Old Colony for its $3,600,000 first and refunding bonds, and (4) the unsecured claim of Old Colony, an *aggregate sum of $8,605,660 is produced.* If this sum is used as an offset against the aggregate of the prior-lien claim and cash requirements, there would remain a balance of $1,889,184 in favor of the principal debtor's estate." (Emphasis supplied.)

The assets and values "assigned" by the Commission (with page references to the Sixth Report) are:

(1)	Union Freight Railroad stock	$ 235,000 (p. 11695)
(2)	Bankers Trust claim	3,250,000 (p. 11695)
(3)	"reorganization securities allocable to Old Colony for its $3,600,000 bonds"	2,010,347 (p. 11696)
(4)	Unsecured claim on lease	3,110,313 (p. 11696)
	Total	$8,605,660

The value for item (3) is that stated above as assigned to the new securities distributable on the $3,600,000 face

amount of bonds plus only $379,200 accrued interest. The $792,000 cash interest on deposit is not taken into account.

(Furthermore, the above computation by the Commission allows the Old Colony, for the $379,000 accrued interest included in item (3), only the discounted market value of new securities distributable under the plan, instead of face amount. All other holders of the New Haven first and refunding bonds have received their interest *in cash*. They have also received cash interest accrued subsequent to June 30, 1943.)

As has been explained under Question 8 above, the District Judge attempted, hypothetically, to figure out how the Commission might have arrived at the price to be paid Old Colony, in his computation entitled "A Permissible Valuation of Old Colony."[24] For this purpose he inserts in his tabulation a new item, admittedly not mentioned in the Commission's Sixth Report, representing $928,000 of cash interest, purporting to represent interest from June 2, 1936, to August 31, 1945.[25] However, in trying to supply the Commission's errors and omissions in respect to the Bankers Trust claim (see under Question 10 below) and the balance of this interest claim, and at the same time to come out with the same total price in new securities as the Commission approved, the District Judge is compelled to squeeze the value of his last item, the Market Terminal properties, into a much smaller figure than the Commission or any party had ever suggested—$1,776,412 instead of the $4,350,128 physical value[26] most often referred to.[27]

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[24] Stip. R. I, No. 11, pp. 11891, 11915.

[25] *Op. cit.*, 11896.

[26] (First) Supplemental Report, 244 I.C.C. 239, 260, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8064.

[27] Sixth Supplemental Report, 261 I.C.C. 195, 201-202, 207-208, Stip. R. I, No. 3, pp. 11682, 11691, 11698-11699.

As to Question 10 in the Petition.

(See pages 33 and 51 of the Petition.)

Question 10 points out a second instance of improper valuation of the Old Colony assets by the Commission, which can be demonstrated on the face of the record in the Sixth Supplemental Report.

The Bankers Trust Company was trustee of the mortgage securing the New Haven's first and refunding bonds, and as such became the assignee from New Haven of the lease of the Old Colony lines, which lease constituted part of the collateral security for the New Haven bonds. After the Old Colony lease was disaffirmed by the New Haven trustees, the Old Colony trustees commenced action against the Bankers Trust Company for its breach of the lease, as assignee, resulting from failure to pay the rent reserved. The amount sought to be recovered by Old Colony is $13,379,215. This suit has never been tried but is pending. Various parties to the reorganization have suggested compromise values for the Old Colony's claim against Bankers Trust; the compromise figure of $3,250,000 was eventually suggested in the Joint Report and is not contested in the present proceeding by your petitioners. It has been generally accepted by the Commission,[28] and the Circuit Court of Appeals [29] construes it to be acceptable to all concerned, although the Old Colony and the Bankers Trust have not agreed upon the compromise nor the District Court "allowed" it. The plan provides for cancellation of the Old Colony's claim against Bankers Trust, in the interest of the New Haven, since New Haven has a possible obligation to indemnify the Bankers Trust in case the latter were held liable to Old Colony.

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[28] Sixth Supplemental Report, 261 I.C.C. 195, 204-205, Stip. R. I, No. 3, 11682, 11695.

[29] Stip. R. I, No. 15, p. 12688.

The Old Colony concedes that, since the claim against the assignee of the lease, Bankers Trust Company, arises from non-payment of rent resulting in breach of the lease, and the breach of lease claim against the New Haven also covers non-payment of rent, it is not entitled to recover in full on both claims, and that payments received or credits given upon the Bankers Trust claim are *pro tanto* an offset against the New Haven claim.

The District Judge has said:[30]

> "It is, of course, perfectly obvious as a matter of law that if the Old Colony claim against Bankers Trust were liquidated in the amount of $3,250,000—and the earlier passage (P. R. 11695) quoted above indicates that the Commission took this claim as having a liquidated value in that amount—Old Colony's unsecured claim against the principal debtor should be treated as reduced only by that amount ($3,250,000) rather than by the full amount of recovery sought ($13,379,215) as stated in the ad damnum clause of the Old Colony declaration against the Bankers Trust Company."

With this your petitioners entirely agree. The question is: What did the Commission do? By what amount did it reduce the Old Colony claim against New Haven for breach of lease, on account of the assumed compromise settlement of the Old Colony claim against Bankers Trust for $3,250,000?

The Sixth Report says:[31]

> "The amount of the Old Colony's unsecured claim against the principal debtor as determined by the district court is $47,186,963. If there be deducted from

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[30] Stip. R. I, No. 11, p. 11894.

[31] 261 I.C.C. 195, 205-206, Stip. R. I, No. 3, pp. 11682, 11696.

> that amount *the full recovery sought in the suit against the Bankers Trust Company* (*$13,379,215*), the claim would be reduced to $33,807,748, and under the plan, the Old Colony would be entitled to receive approximately $31,103,128, par amount of new common stock on this claim. Based upon the expert testimony that the new common stock would have a value of approximately $10 a share, this claim would have *a value of $3,110,313.*" (Emphasis supplied.)

On this the District Court, in a valiant attempt to sustain the plan by "seeing no evil," and echoed by the Circuit Court of Appeals majority,[32] comments on the above passage from the Sixth Report as follows:[33]

> "But there is nothing in the Report to suggest that the comprehensive valuation of the Old Colony estate by the Commission was predicated upon a process whereby the value of the unsecured claim was reduced *by the entire ad damnum.* Here, as elsewhere throughout the Report, the Commission recited the conflicting contentions of opposing parties with respect to the valuation of particular assets or groups of assets. There is nothing in the language here or elsewhere to show that this particular contention was treated as valid and controlling upon the comprehensive valuation which was made." (Emphasis supplied.)

Although the Commission's statement (quoted above) as to deduction of the full $13,379,215 claimed against the Bankers Trust Company from the Old Colony's lease claim

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[32] Stip. R. I, No. 15, pp. 12669-12671, 12688-12689.
[33] 261 I.C.C. 195, 204, Stip. R. I, No. 3, pp. 11694-11695.

against New Haven is prefaced by an "if," it did definitely use the resulting value of the reduced lease claim in arriving at its over-all valuation of the Old Colony assets.

Reference has been made under Question 9 above to application made in the Sixth Report [34] of specific Old Colony assets, at specific cash values, to the satisfaction of the so-called prior lien claim of the New Haven trustees.

The list of items so applied, set forth under Question 9 above (p. 15), where item (3) was discussed, is repeated here (page references to the Sixth Report):

(1) Union Freight Railroad Stock	$ 235,000 (p. 11695)
(2) Bankers Trust Claim	3,250,000 (p. 11695)
(3) New securities distributable on $3,600,000 New Haven bonds	2,010,347 (p. 11696)
(4) Unsecured claim on lease	3,110,313 (p. 11696)
Total	$8,605,660

Note that item (2), the Bankers Trust claim, is listed as an asset valued, on a compromise basis, at $3,250,000. In order to arrive at the Commission's total of $8,605,660, it is necessary to take item (4), the unsecured lease claim, at $3,110,313; but that is exactly the figure which, "based upon the expert testimony," the Commission (in the passage quoted above on page 18) set as the cash value of the new common stock distributable on the lease claim *after it had been reduced by $13,379,215, the full ad damnum of the Bankers Trust claim*—not by $3,250,000, the compromise settlement value at which it is included as item (2). Thus the Commission deprived the Old Colony of the value of $10,129,215 of its lease claim, estimated to be represented (in the Commission's 92% ratio) by some $9,612,625 of

[34] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.

new common stock with a value similarly "based upon the expert testimony" of $961,262.

(This obvious error in valuation cannot be reconciled by asserting that item (3) is not correct, as argued under Question 9 above, since item (3) is understated also, as has been demonstrated. Two understatements cannot offset one another.)

In conclusion, this Court should consider whether the Commission in its valuation of Old Colony assets to be acquired by New Haven under the plan has not applied grossly improper legal standards in offsetting the asset of the Bankers Trust claim against the New Haven lease claim at the face amount of the Bankers Trust claim, instead of at the compromise settlement value at which this asset is credited to Old Colony; and consequently understated by at least $961,262 cash value (in addition to the $792,000 interest credit omitted as shown under Question 9 above) the equivalent price for the Old Colony assets, thereby rendering the plan unfair and inequitable with respect to Old Colony.

Even if these assignments of definite cash values to Old Colony non-operating assets (excepting interest on the $3,600,000 of New Haven bonds, which the Commission ignored completely) were used by the Commission only as a yardstick to measure the adequacy of what may be termed the Commission's ultimate empiric or overall value for all the assets, *still*, if the yardstick was a short yardstick, as we have shown it was, the application of improper standards to the problem of valuation would be a necessary consequence. Would the Commission, or could it properly, have approved that compromise purchase price, if measured by a three-foot yardstick?

AS TO QUESTION 11 IN THE PETITION.

(See pages 33 and 51 of the Petition.)

Question 11 raises another question as to the proper performance of its functions by the Commission in its Sixth Supplemental Report.

As pointed out under Question 10 above, the provisions of the present plan with respect to Old Colony involve two principal steps: (1) Provision for payment, in cash or equivalent, of the New Haven trustees' prior lien claim against Old Colony resulting from operating losses and other expenses; and (2) compensation to the Old Colony bondholders in new securities for the remaining assets of Old Colony. Since the prior lien claim is a prior claim for dollars, it is *essential* that the Old Colony assets applied to payment of such claim be *valued in dollars.*

Such dollar values for certain of the Old Colony assets applied to this purpose (see Sixth Supplemental Report)[35] have not been properly established and used by the Commission. These assets are: (*a*) The $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; (*b*) the Old Colony's claim for rejection of its lease to New Haven, and (*c*) a portion of the price to be paid for the remaining Old Colony assets.

(*a*) As to the $3,600,000 New Haven bonds (including $379,200 accrued interest as discussed under Question 9), the Sixth Report[36] states the new securities of the reorganized New Haven issuable under the plan for these old bonds including such interest. The Report then says: "Upon the basis of the expert testimony of record (taking fixed-interest bonds at 90, income bonds at 40, and preferred stock at 20), a valuation of approximately $2,010,347 *would* result." (Emphasis supplied.) It has been

[35] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[36] *Op. cit.*, 205, Stip. R. I, No. 3, pp. 11695-11696.

demonstrated under Question 9 above that this figure was actually applied by the Commission [37] in its calculation of payment of the prior lien claim.

(*b*) As to the Old Colony's breach of lease claim, the Sixth Report, after crediting (in an improper amount, as shown under Question 10 above) the Bankers Trust claim, estimates that $31,103,128 par value of new common stock would be distributable under the plan on the balance of this unsecured claim of Old Colony. The Report then says: [38] "Based upon the expert testimony that the new common stock would have a value of approximately $10 a share, this claim *would* have a value of $3,110,313." (Emphasis supplied.) It has been shown under Question 10 above that this figure was actually applied by the Commission [39] in its calculation of payment of the prior lien claim.

(*c*) The Sixth Report, after adding up [40] the two Old Colony assets mentioned above and also the Union Freight Railroad stock and the Bankers Trust claim, "under the values assigned by" it, states that such assets fall short, by $1,889,184, of satisfying the prior lien claim. The Commission says: [41] "For the purpose of discharging the balance of the prior-lien claim of $1,889,184 against Old Colony, however, it would take $2,099,093 of the $2,275,902 first and refunding bonds to which Old Colony would be entitled" for its remaining assets under the plan. Here again the Commission uses the same "expert" valuation of 90 for the $2,099,093 of new bonds. A similar valuation is used for the same purpose on an alternative hypothesis.

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[37] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[38] *Op. cit.*, 205-206, Stip. R. I, No. 3, p. 11696.
[39] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[40] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[41] *Op. cit.*, 208, Stip. R. I, No. 3, pp. 11699, 11700.

Unless the sentences quoted above from the Sixth Report constitute findings by the Commission of the value of the new securities applied in lieu of cash to payment of the prior lien claim, *the Commission has made no independent finding,* in any report on this plan, *with respect to the probable market or cash value of the securities of the reorganized New Haven.* It should be noted how carefully, in the quoted sentences, the Commission has *avoided* expressing the dollar values *as its own.* Each is based "upon the expert testimony" and expressed as the value which "would" result, if the "expert" testimony were followed. This appears to be a departure from the practice of the Commission in at least one other case, *Ecker* v. *Western Pacific R. Corp.,* 318 U.S. 448, 461, and note 6, 88 L. ed. 892, 925. There the Commission assigned a value at least to the new no par common stock, if not to all the new securities, in order to establish that senior lienholders were given full compensation.

Why the Commission avoided adopting the "expert" valuations as its own is evident when the character of the "expert" testimony is examined.[42] This is fully discussed in the dissenting opinion [43] in the Circuit Court of Appeals below, where much of the "expert" testimony is quoted, and where it is pointed out that the District Court, in discussing the Third and Fourth Reports, had warned the

[42] The *only* testimony on the probable market or cash values of the new securities to be issued by the reorganized New Haven under the present plan of reorganization is that of Mr. Pierpont V. Davis at the Commission's hearing on February 17, 1942. Mr. Davis' complete testimony on this subject is reproduced in Stip. R. II, No. 29, p. 107. Earlier testimony as to estimated values of the new securities to be issued under the original plan, later disapproved by the Court, is found in the record of hearings held on June 14, 1939, and is reproduced in Stip. R. II, No. 29, p. 93.

[43] Stip. R. I, No. 15, pp. 12720-12725.

Commission that a finding by the Commission of the estimated market values of the new securities was essential (though for a different purpose).

Further, one would not understand from the Sixth Report that the values "based on the expert testimony" are based, as in fact they are, on testimony given in February, 1942, as of that date, while the values needed for calculating payment of the prior lien claim must be *as of December 31, 1943,* the valuation date for the Old Colony plan. Also, since the Sixth Report was not written until after February 13, 1945, when the Old Colony provisions of the plan were referred back to the Commission by the District Court, the Commission was in a much better position to estimate market values as of December 31, 1943, of the new securities than was the single "expert" witness in February, 1942.

The results of the application of the "market values" of new securities based on the "expert testimony" in the three instances (*a*), (*b*) and (*c*) explained above (pp. 22, 23) are of material importance in the aggregate to Old Colony, since, the lower the values used, the more assets are required to satisfy the prior lien claim and the less assets remain for the Old Colony bonds.

The new securities distributable under the plan which are appropriated, in these three instances, in the Sixth Report to payment of the prior lien claim are in face amounts, and are "assigned" by the Commission cash values, as follows:

	Sixth Report	
	Face Amount	Cash Value
(*a*) $3,600,000 first and refunding bonds		
New fixed interest bonds	$1,227,411	$1,104,670
New income bonds	1,776,601	710,640
New preferred stock	975,188	195,038
(*b*) Unsecured claim for breach of lease less $13,379,215 credit for Bankers Trust claim		
New common stock	31,103,128	3,110,313
(*c*) New fixed interest bonds to satisfy balance of prior lien claim	2,099,093	1,889,184
Total	$37,181,421	$7,009,845

If taken on the basis of the "expert testimony," the fixed interest bonds at 90, income bonds at 40, preferred stock at 20 and common at 10, the $37,181,421 "would result" in an aggregate cash value of only $7,009,845 to be credited to the New Haven's prior lien claim.

When the plan was last referred back to the Commission in 1945, your petitioners sought an opportunity at hearings to present evidence that the probable market values of the new securities were substantially higher than the values guessed at by the "expert" witness in February, 1942; but this opportunity was denied by the Commission,[44] and later by the District Court.[45]

The petitioner's offer of proof on July 2, 1945, was, however, included in the record by the District Court.[46] It states that Victor B. Boatner, former Director of Rail Co-ordination in the Office of the Co-ordinator of Transportation and a railroad executive since 1921, would testify, on

[44] 261 I.C.C. 195, 202, Stip. R. I, No. 3, p. 11692.
[45] Stip. R. I, No. 11, p. 11891, 11903.
[46] Stip. R. II, No. 25, pp. 49, 50-52, 57-58.

the basis of an extensive study of the railroad business and railroad securities, that, in his opinion, the new common stock of the reorganized New Haven would sell, when issued, at in excess of $30 per share. It also states that Patrick B. McGinnis, an investment banker who has specialized in railroad reorganization securities for the past thirteen years, would testify that, in his opinion, supported by extensive charts included in the offer of proof, the reorganized New Haven securities, when issued, and if issued about July 1, 1946, would have market values approximately as follows: fixed interest bonds, 105; income bonds, 95; preferred stock, 80; and common stock, 30 to 42. The additional testimony offered by these witnesses is set forth in the offer of proof.

In order to bring out the importance of the lapse of time from the "expert testimony" in February, 1942, to December 31, 1943, this Court is asked to take judicial notice that the Dow-Jones averages for Railroad Stocks (based on common or similar stocks), for High-Grade Railroad Bonds and for Second-Grade Railroad Bonds were as set forth in the following table, on February 16, 1942 (the day before Mr. P. V. Davis's testimony before the Commission), and on December 31, 1943 (the Old Colony valuation date), respectively, viz.:

	Averages		
Dow-Jones	2/16/42	12/31/43	Per cent increase
Railroad Bonds—			
High-Grade	92.43	102.07	10.4%
Railroad Bonds—			
Second-Grade	52.81	67.72	28.2%
Railroad Stocks	27.60	33.56	21.5%

(The December 31, 1943, date here is, of course, eighteen months earlier than the date of the petitioners' offer of proof referred to above.)

It is fair to assume that railroad preferred stocks appreciated, in the above period, less than the common stocks but more than the high-grade bonds, so that the percentage increase in a railroad preferred stock average may fairly be estimated at 15%.

These percentage increases to the Old Colony valuation date, if applied to the estimates or guesses of the "expert witness" before the Commission as to the market values in February, 1942, of the reorganized New Haven securities, would change such probable market values as follows:

New Haven new securities	Estimate 2/17/42	Value adjusted to 12/31/43 level
First and refunding (fixed interest) bonds	90	99.36 (10.4%)
General mortgage (income) bonds	40	51.28 (28.2%)
Preferred stock	20	23.00 (15%)
Common stock	10	12.15 (21.5%)

If the cash values (as of February 17, 1942) "assigned" by the Commission in the Sixth Report, as summarized in the table on page 26 above, are adjusted on the basis of the Dow-Jones averages as of December 31, 1943, as set forth above, it will appear that the three asset items under discussion were materially undervalued when applied to satisfaction of the prior lien claim, viz.:

	Cash Value (p. 26) "assigned" in Sixth Report	Adjusted Cash Value 12/31/43
(*a*) $3,600,000 first and refunding bonds		
New fixed interest bonds	$1,104,670	$1,219,665
New income bonds	710,640	911,041
New preferred stock	195,038	224,293
(*b*) Unsecured lease claim less $13,379,215 credit for Bankers Trust claim		
New common stock	3,110,313	3,779,030*
(*c*) $2,099,093 additional new fixed interest bonds	1,889,184	2,085,659
Total	$7,009,845	$8,219,688

*(If the correct credit of $3,250,000 for the Bankers Trust claim were used—see Question 10, page 17 above—the adjusted value of this item would be $5,338,341.)

The difference, $1,209,843, between the 12/31/43 adjusted value of $8,219,688 and the 2/17/42 "expert" value of $7,009,845 used by the Commission for the same three asset items indicates that these assets were undervalued to that extent by the Commission, and that, on the basis of comparison used above, the Old Colony bondholders would be entitled to the excess $1,209,843 cash value, for which they are not compensated in the plan.

To state it another way, to make a total cash value of $7,009,845 for these assets to be applied to satisfaction of the prior lien claim as in the Sixth Report, only $880,169 face amount of item (*c*) new fixed interest bonds, with a cash value of $875,816, would be required. The remaining $1,218,924 face amount (cash value $1,209,843) of these bonds would be saved, and be available for distribution to the Old Colony bondholders *in addition* to the $7,697,033 face amount of new bonds awarded them in the plan.

While the application of the increase in the Dow-Jones averages for railroad securities from the date of valuations mentioned in the Sixth Report to the date, December 31, 1943, as of which valuations are required by the plan cannot be considered as demonstrating conclusively the corresponding increases in the probable market values of the reorganized New Haven securities, the Dow-Jones increases do demonstrate that *some* increase from the estimates referred to by the Commission is justified and would have been ascertained if the Commission had done its duty in that respect; and that the increase would result in substantial benefit to the Old Colony bonds. The saving to the Old Colony of $1,209,843 cash value of assets, indicated above, if translated into $1,218,924 face amount of fixed interest bonds, would increase the new securities distributable under the plan to the Old Colony bonds from $7,697,033 to $8,915,967 face amount, or 15.8%.

This saving of $1,209,843 added to the $792,000 of interest (under 9 above) paid on the $3,600,000 bonds, but overlooked by the Commission, and to the $961,262 error in the "assigned" value of the lease claim (under 10 above), produces a total error of $2,963,105, or about $3,000,000 in cash value. This discrepancy (which is minimum), if paid in new fixed interest bonds, would give the Old Colony bondholders, in face amount, $10,679,224 of new bonds, rather than the present amount, $7,697,033. This amounts to more than a 25% increase in the net price to the Old Colony bondholders.

In conclusion, this Court in the interest of the application of proper legal standards in Section 77 proceedings should determine whether the Commission failed to make its own independent findings of the essential probable market values as of December 31, 1943, of the new securities applied to the satisfaction of the prior lien claim against Old Colony; and whether, if such findings were made by

implication, they were based on evidence so meager and so out of date as to be unsupported by sufficient evidence.

As to Question 12 in the Petition.

(See pages 33 and 53 of the Petition.)

Question 12 involves the proper construction of the provision of Section 77(d), quoted in the Petition.

The actions of the Commission which raise the question were as follows: After the Court disapproved its original plan, the Commission in February, 1942, held hearings on the matter of a plan of reorganization for the New Haven and particularly the Old Colony. Previous to that time the District Court had "informally" appointed a compromise committee (on which your petitioners were not represented) "to explore the possibilities of progress by compromise" to safeguard the New Haven from excessive burdens which might possibly arise from its assumption of the charter obligations of the Old Colony.[47] That committee had filed with the Court a report [48] containing recommendations for cutting down the Boston Terminal obligations of both New Haven and Old Colony, and for limiting the obligations of the New Haven with respect to the Old Colony's passenger service, and especially its Boston Group suburban lines. (These provisions were, in substance, embodied by the Commission in the present plan of reorganization.) The District Court had then disapproved the original plan of reorganization approved by the Commission's Original Report, as modified by its First and Second Supplemental Reports. The Committee did not then attempt to recommend a fair purchase price for the Old Colony, since it had no assurance that its previous

[47] Prior S.C. R., vol. A, Ex. 6, pp. 8956-8958.
[48] *Op. cit.*, Appendix at p. 9013.

recommendation would be accepted as a basis for the question of price.[49]

At the outset of the reopened hearings of the Commission, in February, 1942, counsel for the New Haven and certain creditors raised the question whether, if the Committee should pursue its negotiations toward a compromise fair purchase price for the Old Colony, they could be assured their previous recommendations limiting the obligations to be assumed by New Haven would be approved by the Commission.[50] At the conclusion of the hearings on February 20, 1942, the Commission's representative ruled that the record would be kept open until April 4, 1942, for the purpose of receiving any agreement arrived at by the compromise committee as to the Old Colony price, "it being understood that any proposal or agreement as to a fair purchase price would not be considered binding unless the terms and conditions proposed in the compromise committee report were approved." The record was also kept open until April 20, 1942, for the purpose of receiving briefs from any parties interested.[51]

On or before April 4, 1942, the compromise committee filed its Joint Report [52] recommending the compromise purchase price for the Old Colony properties which the Commission adopted and approved in its Third Supplemental Report,[53] and which forms the basis, as adjusted for subsequent Old Colony earnings, for the price provided in the present plan. No price for the Old Colony such as the Joint Report proposed was ever proposed, for the record, either prior to or during the February, 1942, hearings.

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[49] *Op. cit.*, 8962, and Third Supplemental Report, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9760-9761.

[50] Third Supplemental Report, *op. cit.*, 64, Prior S.C. R., vol. A, Ex. 8, p. 9761.

[51] *Op. cit.*, 64, Prior S.C. R., vol. A, Ex. 8, p. 9761.

[52] Stip. R. II, No. 36, pp. 133, 152.

[53] 254 I.C.C. 63, 99, Prior S.C. R., vol. A, Ex. 8, p. 9753.

No hearings for the reception of evidence or oral argument, or for cross-examination of witnesses, have been held by the Commission since February 20, 1942.

Your petitioners submit, on the foregoing record, that (*i*) the Joint Report obviously constituted, in substance, a "plan of reorganization" proposed for the Old Colony, as well as an important section of the plan for the New Haven; and (*ii*) the Commission was obligated by Section 77(d) to hold or continue its hearings *after* the filing of the Joint Repor with it.

On the latter point, the two sentences of Section 77(d) quoted in the Petition under Question 12 require interpretation, since the first sentence permits filing of a plan *during* a hearing (but only with the Commission's consent), while the second sentence requires a hearing *after* a plan has been filed. To give effect to both sentences would seem to require that, in case a plan is filed *during* a hearing, the hearing be continued *after* the plan is so filed. In the present case, by holding open the record after the hearings ended, the Commission may technically have arranged for the Joint Report plan to be filed "during" the hearing; but granting two weeks thereafter to file briefs was not the equivalent of giving a "hearing" *after* that plan was filed.

The proper construction of the provisions of Section 77(d) for hearings, in a situation such as is presented here, and the prompt checking of unauthorized adoption by the lower courts of short cuts not in accord with the usual and prescribed procedure, are matters of importance for the efficient and fair administration of reorganizations under Section 77, and should be settled by this Court. This is no mere technical question, but goes to the root of the statute. The drastic powers of the Bankruptcy Court under Section 77 must be founded on a policy of assuring

a fair and reasonable opportunity to all parties in interest to be heard, and we believe the section provides such opportunities. Every encroachment on this policy of fair hearing must be vigilantly resisted by the courts.

The technical approach of the Circuit Court of Appeals [54] below to this issue, we submit, not only gives a construction to Section 77(d) which is unjustified technically, but is wrong as a matter of fundamental policy. It was not a question of a new notice, as the Circuit Court of Appeals appears to think, since all that the statute required was that the Commission adjourn the February, 1942, hearings to be resumed after the Joint Report was filed. Nor, if the statute required a hearing after such filing, was it necessary for your petitioners or any other party to "request" such hearing, as the Circuit Court of Appeals asserts. Your petitioners have consistently objected, at every subsequent opportunity, to the Commission's failure to hold such a hearing, and this objection is properly raised in these proceedings as the Circuit Court of Appeals agrees.

An opportunity to file briefs after the Joint Report was submitted was not the equivalent of a "hearing." *Morgan* v. *United States,* 298 U.S. 468, 480. *Morgan* v. *United States,* 304 U.S. 1, 18. Here, there was no opportunity to submit evidence, to cross-examine the proponents of the Joint Report plan or to argue orally on the merits of the proposed price for the Old Colony first put forward in the Joint Report. That your petitioners desired and assert they had a right to.

In view of the basic importance which the Joint Report price proposal acquired in these proceedings when it was adopted by the Commission and stubbornly adhered to in its Third, Fourth, Fifth and Sixth Supplemental Reports,

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[54] Stip. R. I, No. 15, p. 12663.

and in view of the fact that this price (as adjusted) was subsequently crammed down the Old Colony bondholders by the District Court, despite their rejection, how can it be said that your petitioners were not deprived of a fair hearing on the matter most vital to them in the entire plan?

As to Question 13 in the Petition.

(See pages 34 and 55 of the Petition.)

Question 13 involves the construction of the provisions in Section 77(d) quoted in the Petition.

The question here is whether these provisions apply, when a District Court order approving a plan has been affirmed in part but reversed in part with instructions that the whole plan or a specified part be remanded to the Commission for further action. In the Old Colony case, upon partial reversal the District Court remanded the entire plan to the Commission but limited the purposes for which it was returned to the independent valuation of the Old Colony assets and the price therefor, the most important elements of the plan as to Old Colony. The Commission denied the petition of your petitioners here for public hearings, and held no hearings prior to making its Sixth Supplemental Report and Order.

It is pointed out under Question 13 in the Petition that the question here was not raised in or decided by *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 145 F. 2d, 299; *cert. den.* 324 U.S. 857, 89 L. ed. 1415, since there the Commission *did hold hearings* and receive evidence with respect to the remanded particulars of the plan (*see* 58 F. Supp. 384, 387), as your petitioners here contend the Commission should have done in the Old Colony case.

Ford Motor Co. v. *Nat. Labor Relations Board*, 305 U.S. 364, 83 L. ed. 221, cited by the Circuit Court of Appeals

below,[55] involved the National Labor Relations Act, which provides (Section 10(e)) that, in proceedings in the Circuit Court of Appeals, that Court may order additional evidence to be taken by the Board. The discretion there belongs to the Circuit Court of Appeals. This is entirely different from the statutory requirements of Section 77(d) and (e) of the Bankruptcy Act, quoted above.

Nor is the statement of the Circuit Court of Appeals conclusive, when in its previous decision[56] remanding the Old Colony valuation in the New Haven plan it said: "The Commission may wish to take additional evidence and to modify the plan in the light of new facts. We do not wish to preclude such a course if the Commission thinks it desirable." If the Commission was *obligated* by Section 77(d) and (e) to hold hearings on the aspects of the plan remanded to it, the intimation of the Circuit Court of Appeals that the holding of hearings was discretionary would not control the Commission. This is the question which this Court should consider and decide.

The reason why the Circuit Court of Appeals remanded the Old Colony valuation aspects of the plan to the Commission was that (in its Third, Fourth and Fifth Supplemental Reports and Orders) the Commission[57] "was influenced by the pressure of the compromise agreement and by the fear that a large block of security holders of New Haven would not consent to a plan materially different." In view of this, and of the fact that no opportunity (see under Question 12, above) to present evidence or to argue or cross-examine before the Commission has ever been afforded by the Commission since the Joint Report compromise plan (which the Commission has adopted in substance) was filed, it was particularly imperative that

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[55] Stip. R. I, No. 15, p. 12662.
[56] 147 F. 2d, 40, 54.
[57] 147 F. 2d, 40, 50.

the Commission grant such an opportunity upon remand of the plan. What better way to free itself from the stigma of undue pressure from the so-called "compromise"!

The question here is more than one of procedure, or of formal defect; it is rather whether your petitioners have not been deprived of substantial rights in being denied a hearing upon the remanded aspects of the plan. In fact, a more fundamental defect in a plan is hardly conceivable than to find (as the Circuit Court of Appeals did) that the Commission had not exercised its independent judgment in, nor stated valid reasons for, its valuation of the Old Colony assets. The Circuit Court of Appeals recognized the sweeping character of this defect when it held:[58]

> "The prior appeal (147 Fed. 2d 40) decided nothing respecting the provisions affecting Old Colony except that the Commission had not made independent findings of value and of price and the statute required that it should. Hence the Commission's new report will be subject to attack upon any legal ground when it comes before the district court."

In the interest of efficient administration of many cases under Section 77, it is of importance that the effect of a partial reversal of an order approving a plan, and of partial remand of a plan to the Commission, and the application to such situation of sub-sections (d) and (e), be settled by this Court, and that an improper departure by the Commission from its own practices as to hearings (see the *Milwaukee* decision, 58 F. Supp. 384, 387, cited above) should not be sanctioned by the lower courts as in this case.

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[58] 150 F. 2d, 169, 170, Stip. R. I, No. 5, pp. 11825, 11827.

As to Question 14 in the Petition.

(See pages 34 and 57 of the Petition.)

Question 14 invites consideration of whether bondholders can be held not reasonably justified in rejecting a plan, where the plan had not been validly approved by the Commission and, therefore, could not have been validly approved by the District Court. This is a question of general importance to the proper administration of railroad reorganizations under Section 77, which has not been, but should be, settled by this Court.

This question is of importance here because, although the Commission subsequently approved the identical plan again in its Sixth Report of May 15, 1945, such plan was not subsequently submitted to creditors for acceptance or rejection (see under Question 15 herein).

On February 8, 1944, the Commission issued its Fifth Supplemental Report and Order purporting to approve a plan of reorganization with certain modifications specified in the Order (the modified plan being identical with the plan now before this Court); and the District Court promptly entered its Order No. 734 [59] purporting to approve the plan. Your petitioners and others appealed from this order, but meanwhile the order was certified to the Commission and it proceeded to submit the plan to various classes of creditors, including the Old Colony bondholders, for approval. The ballots were accompanied, as required by Section 77(e), by copies of the Third, Fourth and Fifth Supplemental Reports of the Commission and of the opinions and orders of the Court, among other papers. On December 29, 1944, the Commission certified [60] the results, showing that less than two-thirds of the Housatonic divisional lien bonds of New Haven voting had

[59] Stip. R. II, No. 21, p. 11, D. R. 11050.
[60] C.C.A. R., Ex. , D. R. 11516.

accepted the plan, that 50.6% of the Old Colony bonds voting had *rejected* the plan, and that the requisite percentage of the other classes had accepted it.

Four days later the Circuit Court of Appeals reversed [61] the District Court order approving the plan, so that the Commission might make its own independent findings of value of and price for the Old Colony assets. The principal recommendations of the fairness of the plan on which the creditors were to rely in voting were the recommendations of the Commission in its Third, Fourth and Fifth Reports; if these Reports showed on their face that the Commission had been influenced by fear and pressure for compromise, with respect to the treatment of Old Colony, surely the Old Colony bondholders were justified in rejecting a price brought forward by the Commission in such circumstances.

The Circuit Court of Appeals said: [62]

> "The Commission's third supplemental report, 254 I. C. C. 63, with respect to the Old Colony purchase price is substantially a copy of the Joint Report changed only to meet the requirements of a report by the Commission. The Commission said, 254 I. C. C. at page 96: 'As seen herein, the principal debtor and its major secured creditors, the Old Colony and the mutual savings bank group, the latter holding more than one-half of the bonds of the Old Colony, and a representative of the public, an assistant attorney general of the Commonwealth of Massachusetts (it was understood that any agreement of the assistant attorney general would not be binding on the Commonwealth), have agreed upon a compromise purchase price. The basis of the compromise has been fully explained. The desirability, in some situations,

[61] 147 F. 2d, 40.
[62] *Op. cit.*, 49-50.

of a compromise has been stated by the Supreme Court in *Case* [*et al.*] v. *Los Angeles Lumber Co.* [*Ltd.*], 308 U. S. 106 [60 S. Ct. 1, 84 L. Ed. 110]. While the agreed purchase price is smaller in amount than that which we formerly determined, upon further consideration, we find that the purchase price proposed in the joint report is fair and equitable, and, in our opinion, conforms to the principles which the court in its opinion indicated governed, and we will modify the plan accordingly.'

"Again, 254 I. C. C. at page 99, the Commission said that 'the court . . . indicated that in its opinion the best prospect of prompt progress appeared to be by reasonable compromise.' It said also that while the principal New Haven and Old Colony parties 'have evolved an agreed basis for inclusion of the Old Colony in the reorganization,' certain of Old Colony's security holders and representatives of the Commonwealth of Massachusetts 'strongly oppose such agreement.' It then added 'In our opinion, and we have so found, the agreement in respect of the Old Colony, with minor modifications made therein by us, offers a fair and equitable solution of these problems.'

"We find it difficult to read the third supplemental report and draw any inference other than that the agreement of the parties was the dominant factor in the Commission's formal finding that the purchase price is fair and equitable. This formal finding might perhaps suffice if the Commission had stated the reasons which lead it to reduce by some $10,000,000 face value of the new securities its prior valuation, but we find no reference to facts causing such change unless it be the compromise approved by the parties. Moreover, in its fourth supplemental report (254 I. C. C. 405, 422) the Commission, after discussing a proposal

by the Commonwealth of Massachusetts with respect to Old Colony, makes the following significant statement: 'It is likewise clear that to modify materially the provisions of the joint report in respect of the Old Colony would be to nullify the compromise agreement reached after extended negotiations with little or no expectation that the suggested modification would prove acceptable to the interested parties. The result again would be a further delay in the consummation of the reorganization of the principal debtor and the Old Colony.'

"*We cannot read this otherwise than as meaning that the Commission accepted the compromise of the joint report for fear that any material modification of it, which the Commission might have independently approved as fair and equitable, would be unacceptable to the parties and would result in delay in consummation of a reorganization.* That is to say, the Commission was influenced by the pressure of the compromise agreement and by the fear that a large block of sec r-ity holders of New Haven would not consent to a plan materially different. We think the appellant has substantiated its contention that the Commission exercised no independent judgment in fixing the purchase price for Old Colony assets but followed the easy route of accepting the compromise." (Emphasis supplied.)

As to Question 15 in the Petition.

(See pages 35 and 57 of the Petition.)

Question 15 raises a question of importance to the fair and efficient administration of reorganizations under Section 77, which has not been, but should be, settled by this Court.

The provisions of the plan of reorganization (in the Fourth and Fifth Reports) relating to the valuation of and price for the Old Colony assets were remanded to the Commission by the Circuit Court of Appeals [63] in order that the Commission might exercise its independent judgment thereon and state its reasons. This involved reversing, in that respect, the previous order (No. 734) of the District Court approving the plan. As has been pointed out above at the end of the discussion of Question 13, the defect in the plan on which the reversal was based was fundamental and far-reaching; it cannot be belittled by terming it "a formal defect" as does the Circuit Court of Appeals below.[64] But the plan which was remanded was the plan which had previously been submitted to the creditors for acceptance or rejection, and, when so submitted, was rejected by a majority of the Old Colony bondholders voting thereon.

When the same plan was again reported by the Commission in its Sixth Supplemental Report, the District Court attempted to short-cut the statutory procedure by (Order No. 821)[65] "enlarging the record" to include that Report and by "reinstating" its previous order No. 734, approving the plan submitted in the Fourth and Fifth Reports, thus avoiding approving the plan specifically. The Court thereupon also entered Order No. 822 confirming the plan.[66]

It has been pointed out, at the end of the discussion of Question 12, that the elements of the plan remanded to the Commission by the Circuit Court of Appeals were the core of the plan as to Old Colony, and it would follow that the Commission in its Sixth Report and Order was certi-

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[63] 147 F. 2d, 40.
[64] Stip. R. I, No. 15, p. 12672.
[65] Stip. R. I, No. 12, p. 11922.
[66] Stip. R. I, No. 13, p. 11924.

fying to the Court a "plan," at least as to Old Colony, within the meaning of Section 77(d) and (e).

It should be determined, therefore, by this Court whether the plan as to Old Colony was not required to be resubmitted to the Old Colony bondholders, if not to the New Haven creditors also, for acceptance or rejection. In effect, the lower Courts sanctioned a departure from the statutory procedure, and what should be the usual course of procedure, which should be examined by this Court.

The Circuit Court of Appeals below [67] reasons that such submission would be "futile," the plan previously submitted to vote being unchanged, since, if the Old Colony bondholders again rejected it, "discretionary confirmation [by the District Court] would follow." The reasoning that submission of a plan to vote is unnecessary since the Court can "cram down" the plan on dissenters in any event goes too far; it would render submission of *any* plan "futile" and nullify the statutory provision for submission of plans. Nor should the Circuit Court of Appeals take the District Court's future discretionary decision for granted. The District Court would be required to grant a hearing to the objectors, and, for example, if the majority vote of the Old Colony bondholders for rejection of the plan should heavily increase on the second submission, the Court might elect to exclude the Old Colony entirely from the plan, as provided therein.[68]

If this Court should reverse the Courts below on any ground raised by this Petition, the District Court may consider the procedural short-cut described above to be again appropriate, unless this question is decided here.

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[67] Stip. R. I, No. 15, pp. 12672-12673.
[68] Stip. R. I, No. 1, pp. 10831, 10922.

Conclusion.

For the reasons stated in the Petition for Writ of Certiorari as supplemented by the argument in the foregoing brief, the Protective Committee for Bonds of Old Colony Railroad Company respectfully submit that their Petition should be sustained and granted, and that a writ of certiorari should issue in this cause, as provided by law, to the end that this cause may be reviewed and determined by this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER

of

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated: May 22, 1947.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents Insurance Group, Mutual Savings Bank Group, Bankers Trust Company as Trustee under the First and Refunding Mortgage, United States Trust Company of New York as Trustee under the Harlem River & Port Chester Mortgage, Irving Trust Company as Trustee under the 6% Collateral Trust Indenture dated April 1, 1925, Bank of New York as Trustee under the New England Railroad Company Mortgage, City Bank Farmers Trust

Company as Trustee under the Central New England Railway Company First Mortgage, and Protective Committee for Holders of Boston and New York Air Line First Mortgage 4% Bonds, own or represent the major portion of the secured debt of The New York, New Haven & Hartford Railroad Company, Debtor. Respondents Old Colony Railroad Company Plan Committee and The New York, New Haven & Hartford Railroad Company, Debtor, have joined with them in the courts below in actively supporting the provisions of the Plan of Reorganization for the New Haven involved in the pending petition. Those provisions have heretofore been approved by the Interstate Commerce Commission (hereinafter called the "Commission"), the District Court for the District of Connecticut (hereinafter called the "District Court") and the Circuit Court of Appeals for the Second Circuit (hereinafter called the "Circuit Court of Appeals") as meeting in all respects the requirements of Section 77 of the Bankruptcy Act.

Opinions Below.

The District Court approved the Commission's Plan with certain corrections in December, 1943 (54 F. Supp. 595)[1] and, as so corrected by the Commission, in March,

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[1] R. 10,695-10,763. For uniformity and convenience, references herein use substantially the same abbreviated designations employed by Petitioners (Petition, footnote pp. 2-3), as follows:

Stipulation volumes—Stip. R.
Prior Supreme Court Record—Prior S. C. R.
C. C. A. Record from Court below—C. C. A. R.
District Court Record, generally—R. (rather than D. R.).

As Petitioners' 64 page petition and their 44 page brief contain scant reference to the lengthy record of testimony before the Commission, no abbreviated designation was used. Such references herein are designated "ICC R.".

1944 (54 F. Supp. 631).[1] In January, 1945, the Circuit Court of Appeals affirmed the District Court's approval in all but two respects (147 F. (2d) 40),[2] one of which, involving the Old Colony Railroad Company (hereinafter called "Old Colony"), required further consideration by the Commission. The limited scope of this reconsideration was also approved by the Circuit Court of Appeals in June, 1945 (150 F. (2d) 169).[3] After reconsideration of the Plan by the Commission without modification, the District Court again approved the Plan and confirmed it in August, 1945 (unreported)[4] and in January, 1947 the Circuit Court of Appeals affirmed that approval and confirmation (unreported).[5]

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

A Limited Aspect of the Plan is Involved Here.

The Old Colony is a subsidiary debtor in this proceeding under Section 77(a). Its reorganization as a part of the Plan for the New Haven has been approved by the Commission, the District Court and the Circuit Court of Appeals. After consummation of the Plan, the Old Colony properties, which from 1893 until disaffirmance of the Old Colony lease in June, 1936 were operated by the New Haven

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[1] R. 11,024-11,049.
[2] R. 11,525-11,545.
[3] Stip. R. I, No. 5, pp. 11,825-11,827.
[4] Stip. R. I, No. 11, pp. 11,891-11,914.
[5] Stip. R. I, No. 15, pp. 12,655; 12,765.

as part of its system, will continue as part of that system[1] and be owned rather than leased by the reorganized New Haven.

In terms of securities to be issued in the reorganization the relative importance of the properties of the New Haven proper and those of the Old Colony is illustrated by the fact that of the $372,697,033 principal amount of the securities of the reorganized New Haven to be issued upon consummation of the Plan, those distributable to creditors of the New Haven proper total $365,000,000 face amount as compared with $7,697,033 in the case of Old Colony, plus cancellation of the New Haven's prior lien claim against Old Colony of approximately $10,500,000.

The pending petition is concerned solely with certain of the provisions of the Plan that provide for the joint reorganization of the New Haven and the Old Colony, which for convenience are reprinted as Appendix A hereto. Not all of them are objected to by Petitioners. Petitioners do not object to the provisions that will relieve the New Haven from all obligation to operate passenger service on Old Colony lines if the operating losses from such service exceed certain specified "critical figures" (Par. N(2) and (3)). They do not object to the limitation placed upon annual payments for the use by the reorganized New

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[1] The New Haven system consists of three groups of properties —those of the New Haven proper, those of the Boston & Providence Railroad Corporation, and those of the Old Colony. By far the most important of these properties in terms of track mileage, volume of traffic, revenues, net income, bonded and other indebtedness and fixed charges, are those of the New Haven proper, which include all of the system's railroad lines west of Providence, Rhode Island. The properties of the Boston & Providence consist principally of its railroad line between Providence and Boston, which is a major link in the New Haven system's main line from New York to Boston. Those of the Old Colony are chiefly its railroad lines in southeastern Massachusetts, none of which is main line trackage.

Haven of the Boston Terminal (Par. N(1)). In fact, any value the Old Colony may have for reorganization purposes arises in large part from these provisions. Petitioners' complaint is simply that the Old Colony properties are worth more to the reorganized New Haven than the Commission has found, and that after the claims against Old Colony ranking prior to the Old Colony Bonds have been satisfied by the New Haven estate in cash or its equivalent, the holders of those Bonds should receive more new securities than the $4,398,305 fixed interest bonds and $3,298,728 income bonds distributable to them under the Plan (Par. N(4) and (5)).

The Commission in its Sixth Supplemental Report (Stip. R. I, No. 5, pp. 11,825, *et seq.*) held this complaint to be without factual basis. The District Court in its decision of August, 1945 (Stip. R. I, No. 11, pp. 11,891, *et seq.*) and the Circuit Court of Appeals in its decision of January, 1947 (Stip. R. I, No. 15, pp. 12,655, *et seq.*) have since rejected it as without legal foundation. Petitioners now seek a writ of certiorari to give them still another opportunity to attempt to upset the Commission's valuation of the Old Colony's properties.

Despite Petitioners' opposition to this part of the Plan, the Old Colony Plan Committee, which has taken an active part in the reorganization proceedings since the disaffirmance of the Old Colony lease, supports the Plan and has joined in this brief because a separate reorganization would increase the New Haven's prior lien claim discussed below by including operating losses subsequent to December 31, 1943, the "cut-off date" in the Plan, and might result in an equity receivership for Old Colony in which it would not be possible to impose limitations on Old Colony's future losses—all resulting in Old Colony bondholders'

(less than one-fourth of whom in terms of principal amount are represented by Petitioners) receiving far less than the Plan provides.

Statement of the Case.

In the New Haven proceedings, which began nearly 12 years ago, the Commission has held hearings on plans for the New Haven and the Old Colony at six different times. More than 4,300 pages of testimony have been recorded and 297 exhibits received in evidence. Over 1,500 pages of this testimony and over 75 of the exhibits (in addition to those which indirectly relate to the Old Colony) are concerned primarily with the treatment to be accorded Old Colony.

The Old Colony properties.

The Old Colony properties, upon which such long and intensive consideration has centered, consist of its railroad lines in southeastern Massachusetts, none of which is main line trackage; certain terminal facilities in Boston known as the "Market Terminal", "Yards Nos. 4 and 5", and the "Heating Plant"; one-half of the capital stock of Union Freight Railroad, a switching line in Boston; $3,600,000 First and Refunding Bonds of the New Haven; an unsecured claim allowed against the New Haven for damages from the disaffirmance of the Old Colony lease and an alleged but unadjudicated claim against the Trustee of the New Haven First and Refunding Mortgage based upon the disaffirmance of the Old Colony lease. The latter two claims have arisen, and the $3,600,000 First and Refunding Bonds have been acquired, during the reorganization.

Approximately $10,500,000 of claims against the Old Colony properties rank prior to the claims of the Old Colony bondholders.

In June, 1936, the Old Colony lease was disaffirmed upon the ground that the $1,600,000 annual net rental was an onerous burden from which the New Haven estate should be relieved. Later, application of the segregation formula approved by the Commission showed an Old Colony operating deficit of approximately $2,000,000 per year over and above the rental.

Disaffirmance of the Old Colony lease gave immediate relief from the rental payments, but the obligation to advance cash to meet Old Colony operating losses continued, for under (c)(6) of Section 77 the District Court directed the New Haven Trustees in the public interest to operate the Old Colony properties for Old Colony's account. As security for the repayment of the funds so advanced, the New Haven estate has a prior lien upon all the Old Colony properties. *Palmer* v. *Palmer*, 104 F. (2d) 161 (1939), *cert. den.* 308 U. S. 590 (1939). In 1939 the New Haven Trustees became concerned lest the Old Colony properties should prove inadequate security for the repayment of their advances. Upon their petition, the District Court directed them not to advance further funds for the payment of Old Colony taxes and the portion of Boston Terminal taxes and bond interest chargeable to Old Colony, as the payment of those items was not essential to the maintenance of service on the Old Colony lines (R. 6,159-6,169). On appeal that order was upheld by this Court in *Palmer* v. *Webster & Atlas Nat. Bank*, 312 U. S. 156 (1941). However, upon consummation of the Plan the New Haven will be obligated to pay the claims[1]

[1] Claims for Old Colony taxes through December 31, 1943 have been settled and paid by the New Haven.

for those items to the extent allowed and the estimated amounts thereof through December 31, 1943, the "cut-off date", have been included in the New Haven's prior lien claim against Old Colony. As computed by the Commission through December 31, 1943, the prior lien claim, including reorganization expenses, amounted to $10,494,844.

If the total net operating deficit of the Old Colony properties since December 31, 1943 should be taken into account, the New Haven's prior lien claim would be substantially increased with a corresponding reduction in the amount of securities distributable to the Old Colony bondholders. But if the Plan is consummated, the New Haven estate will have borne Old Colony's operating deficits since December 31, 1943 and will have no claim for reimbursement.

Nevertheless, the Old Colony bondholders will receive over $7,650,000 principal amount of bonds of the reorganized New Haven under the Plan.

The Commission has found and determined that the Old Colony properties, when operated as a part of the New Haven system under the Plan's limitations upon Old Colony passenger losses and Boston Terminal charges, have sufficient value, after satisfaction of the New Haven's $10,494,844 prior lien claim, to justify the issuance to Old Colony bondholders of $4,398,305 of new fixed interest bonds and $3,298,728 of new income bonds of the reorganized New Haven (Stip. R. I, No. 1, pp. 10, 914-6; No. 3, p. 11, 701). This is the determination of which Petitioners complain.

The Proceedings Before the Commission and the Courts Relating to Old Colony.

Petitioners' description of the consideration the Commission has given to the Old Colony problems is far from

complete. The Commission's study of those problems falls into two major periods. During the first, the Commission's consideration of Old Colony problems paralleled its development of a plan for the New Haven proper. During the second, the treatment to be accorded the Old Colony has been the major issue in the reorganization. Petitioners, however, dismiss the entire first period (1937-1940) and much of the second period (1940 to date) with seven lines of comment solely about the Commission's Report of March, 1940. In part, this may be due to the fact that by February, 1942, when Petitioners intervened before the Commission, practically all of the significant testimony and evidence (other than current reports of revenues periodically transmitted to the Commission) regarding the Old Colony, its properties, its lack of earning power and its obligations, had already been presented to the Commission.

First Period (1937-1940). The first plan proposed by the New Haven provided for the joint reorganization of the Old Colony and the New Haven, and was filed with the Commission in June, 1937. The testimony and evidence presented at the hearing before the Commission in July in support of the proposed joint reorganization gave the Commission at the outset a substantial knowledge of the Old Colony, its properties and its problems. The Old Colony Railroad Company, the Old Colony Shareholders' Protective Committee, the Old Colony Trust Company, as Trustee of the Old Colony First Mortgage, and the Mutual Savings Bank Group (which at that time held over $7,000,000 of the $16,448,000 outstanding Old Colony Bonds) were all represented by counsel at the first hearing (ICC R. 1-259).

The second hearing before the Commission was held in September, 1937. The Old Colony parties were again represented by counsel, who took an active part in the cross-

examination of the witnesses who had testified at the July hearing. The Insurance Group, however, took the position at the September hearing that because of its tremendous operating deficits the Old Colony properties should be reorganized separately. This action placed squarely before the Commission the question whether the Old Colony should be included in the reorganized New Haven and, if so, on what terms (ICC R. 259-733).

The third hearing before the Commission began November 9, 1937 and continued for six days. In the meantime Old Colony parties had filed various proposals for the joint reorganization of the New Haven and the Old Colony. At the hearing the proponents of the various plans and proposals presented supporting testimony and evidence; the witnesses for the Old Colony parties included two experts on railroad operations who testified at length concerning the Old Colony, its properties and their value in reorganization (ICC R. 737-2223). The briefs filed after the hearing covered in detail the nature and value of those properties and the various proposals for reducing their operating deficits. In June, 1938 an I. C. C. examiner's report was issued which recommended that no plan for the New Haven be approved by the Commission at that time.

This testimony and evidence before the Commission demonstrated that reorganization of the Old Colony jointly with the New Haven could only be justified in the public interest if the Old Colony operating deficits could be permanently eliminated or substantially reduced. In June, 1938 upon the basis of a survey prepared by the Trustees at their request, the Old Colony Railroad Company, the Old Colony Shareholders' Committee and the Mutual Savings Bank Group petitioned the District Court for the immediate discontinuance of passenger service at 88 stations on the Old Colony lines (R. 4443-4451). After

hearing, the District Court directed the discontinuance asked for, but its order was reversed by the Circuit Court of Appeals in *Converse* v. *Massachusetts,* 101 F. (2d) 48 (1939). This Court sustained the Circuit Court in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), but made it clear that while the District Court could not alone disregard local regulatory bodies in such matters, that could be done by the Commission and the District Court "as part of a complete plan of reorganization for an insolvent road" (308 U. S. 79, 88).

In the meantime, in August, 1938 the District Court upon its own motion had appointed a Committee of railroad experts headed by Professor William J. Cunningham, Professor of Transportation at Harvard University, to study and report upon the operations of, and possible economies on, the Old Colony and Boston & Providence lines. After extensive investigation the Cunningham Committee reported that it had found no way to bring about substantial decreases in the Old Colony operating deficits short of completely abandoning large portions of the Old Colony lines or discontinuing by far the major portion of its passenger service. The studies made it plain that the major cause of these deficits was passenger service on the so-called "Boston Group", comprising the commuting lines from Boston to Middleboro and Plymouth. The Cunningham Committee report and studies were made part of the record before the Commission (Original Report (Div. 4), R. 7, 917).

In October, 1938, the Commission reopened the record and permitted the Debtor to file a revised plan. In its revised plan the Debtor abandoned its earlier proposal for joint reorganization of the New Haven and the Old Colony, stating subsequently that it was "not willing to take over the properties of the Old Colony unless it is

finally and permanently relieved of any obligation to operate passenger service over the lines of the so-called Boston group.'"[1] Seven of the amended plans or proposed modifications of the Debtor's amended plan thereafter filed with the Commission by other parties dealt specifically with the Old Colony and its properties, particularly the amended plan of Old Colony Railroad Company which was based upon the studies then being made by the Cunningham Committee, and called for joint reorganization as a part of the New Haven although upon varying terms.

At the request of the Old Colony parties, hearings before the Commission on these plans and amendments were postponed until the Cunningham Committee studies were completed, and did not begin until June 14, 1939, continuing thereafter for three days to permit the proponents of the various amended plans and proposals to present their supporting testimony and evidence. The evidence included extended testimony by Professor Cunningham regarding possible ways of reducing the Old Colony operating deficits and concerning the value of its properties to the reorganized company (ICC R. 2229-3044). Briefs were again submitted, those of the Old Colony parties covering exhaustively the question of the value of the Old Colony properties to the reorganized New Haven.

Late in 1939 a second examiner's proposed report was issued. It recommended a plan of reorganization for the New Haven and that no plan should be approved at that time for Old Colony. All of the Old Colony interests objected vigorously to this latter recommendation in formal exceptions filed with the Commission and later in oral arguments made by their counsel before Division 4 of the Commission in December, 1939.

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[1] Statement of Position, June 5, 1939, p. 6.

Division 4 issued the first Report and Order approving a plan of reorganization for the New Haven in March, 1940 (R. 7,869-8,036). With respect to the New Haven proper it was similar to the plan recommended by the examiner, and as regards Old Colony, Division 4 concluded—

> "On the basis of the data of record, the acquisition by the principal debtor of the Old Colony's properties and the assumption of the direct responsibility for their future operation would entail the assumption of an extremely onerous financial burden which, in our opinion, would be unfair to the creditors of the principal debtor and contrary to the broad public interest, in that it may impair the ability of the principal debtor to render efficient, economical and safe service on the remainder of its system (R. 7,920).
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> "We conclude, therefore, that we should refuse to approve, at this time, the Old Colony's plan of reorganization or a plan of reorganization for the Old Colony, or the acquisition of all or any part of its property by the reorganized principal debtor" (R. 7,921).

Commissioner Eastman dissented regarding Old Colony. Certified copies of this Report and Order were filed with the District Court in March, 1940 (R. 7,775).

Petitioners refer briefly to the Division 4 Report and Order, but they fail even to mention the three years of hearings before the Commission and the extensive study and consideration given to the Old Colony problems by the Commission during that period.

Second Period (*1940-1947*). Upon petition of Old Colony interests and over the protests of New Haven parties, the Commission in August, 1940 reopened the pro-

ceedings before it to receive further evidence solely on the question of inclusion or exclusion of Old Colony. Despite the fact that by this time the question of the inclusion or exclusion of Old Colony had become the major issue in the reorganization, and despite the fact that this fifth hearing before the Commission was solely concerned with recording additional testimony and evidence relevant to this issue, Petitioners do not even mention it. The hearing began September 9, 1940 and continued for three days. The Old Colony interests, including in addition to those already mentioned the Commonwealth of Massachusetts, the Special Railroad Commission appointed by the Massachusetts Legislature, the City of Boston and the Old Colony Commuters & Shippers League, called seventeen witnesses who testified concerning the Old Colony and its operations; more than 30 additional exhibits were introduced. Over 450 pages of testimony were recorded; this, together with the testimony concerning Old Colony previously received, totaled over 1,000 pages, or more than 25% of the entire record before the Commission. The evidence presented at the September hearing showed that some savings had been achieved and that the Old Colony operating deficits, which were then running at about $1,150,000 a year, could be somewhat further reduced (ICC R. 3295-3775). Briefs were again filed and oral argument before the full Commission took place in October, 1940, with all of the Old Colony parties participating.

Meanwhile, the Old Colony Trustees had instituted proceedings before the Commission for the complete abandonment of the Boston Group, testimony and evidence in support of the abandonment had been submitted, and an examiner's proposed report recommending abandonment had been issued. But on February 18, 1941, the Commission issued a Report and Order in which it refused to

approve the abandonment of the Boston Group, although agreeing that "much remains to be done before it (passenger service on the Boston Group) will be self-supporting".[1] The same day the Commission also issued a Supplemental Report and Order which for the first time provided for joint reorganization of the New Haven and the Old Colony (R. 8,037-8,114). The Commission recognized, however, that the conditions under which the Old Colony operates "are such that it cannot endure the present heavy loss from passenger service" (R. 8,063), and that this loss "must be eliminated or reduced to relatively small proportions, if a sound, feasible, and fair plan of reorganization for the Old Colony is to be approved at this time" (R. 8,063). This modified plan included a provision intended to enable the reorganized New Haven, subject to Commission approval, to relieve itself from any obligation to continue passenger service on Old Colony's Boston Group if the Old Colony's operating deficits should continue at a high level during 1941 and 1942 or the five years ending 1945. Commissioners Mahaffie, the Commissioner who had attended most of the hearings, and Porter dissented, Commissioner Mahaffie stating:

> "* * * I would not require the New Haven security holders to assume that burden. If the public insists on service that costs more than is paid for it the deficit should be made up by a public assessment rather than by one levied against the New Haven bondholders" (R. 8,081).

The Commission certified its modified plan to the District Court, where all parties had an opportunity to file objections and supporting briefs and to take part in the

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[1] *Old Colony Railroad Company et al., Trustees' Abandonment,* 244 I. C. C. 303, 334 (1941).

argument in June, 1941 (R. 7,775-6; 8,531-2). At the argument, the District Court appointed a committee of four members, consisting of counsel for the Old Colony Railroad Company, the Commonwealth of Massachusetts and the Insurance Group, and a member of the Trustees' staff, to endeavor to work out a solution of the Old Colony problem.[1] That Committee made a report (R. 9,013-9,031) which the Court subsequently attached to its opinion and commended to the Commission. With respect to Old Colony, the Court held that the provisions for its joint reorganization with the New Haven were unfair and discriminatory against New Haven's secured creditors and that the limited assurance provided in the Plan against unreasonable Old Colony passenger operations were of doubtful validity and effectiveness (R. 8,923-8,964). The Court disapproved the Plan and referred the proceeding back to the Commission in accordance with subsection (e) of Section 77 (R. 9,067).

The Commission then, for the fourth time, reopened the record to receive such additional evidence as any party

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[1] Petitioners' statement regarding the appointment of this Committee, namely, that "thus, within the slightly more than four months of the time when the Commission first certified a plan for Old Colony, the Court had diverted the proceedings into the channels of compromise", leaves the inference that the District Court should have disapproved the plan and referred it back to the Commission without any effort to work out a solution of the Old Colony problems. Possibly such procedure would have been justified if, as Petitioners intimate, the Old Colony problems had been under consideration for only four months. But the Commission had been holding hearings, hearing arguments and receiving briefs concerned wholly or in part with Old Colony problems not for four months, *but for four years*. In their effort to make the action of the District Court appear objectionable, Petitioners disregard the fact that the very provisions of the Plan which may keep the Old Colony operating deficits within limits, which to a considerable extent give Old Colony such value as it may have for reorganization purposes, and to which therefore Petitioners do not object, are attributable to the work of the Committee appointed by the District Court in June, 1941. As to the propriety of the District Court's action, see *Gardner v. New Jersey*, 91 L. ed. 410 (1947).

might wish to introduce. The subsequent hearings, which were the sixth, began February 17, 1942 and continued for four days. Thirteen witnesses testified for seven parties, the record of their testimony exceeding 500 pages. Fifty-three additional exhibits were introduced. Professor Cunningham testified as an expert witness for the Mutual Savings Bank Group regarding the value of Old Colony's properties for reorganization purposes. Two witnesses testified for the Massachusetts Special Railroad Commission regarding the efforts of that Commission to assist in reducing the Old Colony operating deficits (ICC R. 3778-4334).

Petitioners took part in the New Haven reorganization for the first time at the February, 1942 hearing, and now disregard practically everything that had previously transpired in this proceeding. Although over six months had elapsed since their organization as a Committee, and although in their intervention petition before the Commission they had specifically asked that they be granted the right to "produce and cross-examine witnesses", Petitioners did not offer any evidence at the February hearing, either in the form of testimony or as exhibits. Their counsel made a statement to the effect that Petitioners were not satisfied with the Commission's plan "that was turned down by the Court" and that they were not getting "anywhere near enough the strategic value of the Old Colony Railroad". But he did not cross-examine either Professor Cunningham or the witnesses of the Massachusetts Special Railroad Commission, although he did question one of the Debtor's witnesses regarding the segregation formula approved by the Commission in 1938.

Petitioners now try to excuse their inactivity at the February, 1942 hearing on the ground that "no evidence was there introduced which would serve in any way to sup-

port a reduction by the Commission of the value of the Old Colony property" from the determinations made by the Commission in February, 1941 (Petition, pp. 9-10). But this excuse completely ignores the controlling fact that the reason for the hearings was the District Court's decision that the Old Colony features of the Plan were discriminatory against New Haven's secured creditors. Consequently, the burden was not, as Petitioners imply, upon other parties to come forward with evidence to support a reduction of the Commission's earlier valuation of the Old Colony properties, but rather upon the Old Colony parties, including Petitioners, to present evidence to overcome the effect of the District Court's holding of discrimination. If, as suggested by Petitioners, the evidence regarding Old Colony did not bulk large at that hearing, it was because the Commission's record with respect to Old Colony's operations and value had practically reached the saturation point.

After all of the evidence was in at this hearing the record was held open to receive such further proposals as the Committee appointed by the District Court might desire to make regarding the Old Colony, particularly with reference to terms for its joint reorganization with the New Haven. The so-called "Joint Report" (Stip. R. II, No. 36, pp. 133-166) was filed pursuant to this ruling. It contained, with but little modification, the proposals originally made by the Court Committee for limiting the Old Colony losses to be borne by the reorganized Company, and stated the joint views of the Mutual Savings Bank Group, as holders of a substantial amount of Old Colony Bonds, the Debtor, and the Insurance Group as to the amount of new securities the holders of Old Colony Bonds should receive in a joint reorganization of the Old Colony and the New Haven. When the record was held open it was expressly stated that any party would have the right after the filing of the Joint

Report to petition the Commission for a further hearing after the filing of any proposal by the Committee,[1] but no such petition was filed by Petitioners. Briefs were submitted to the Commission by all parties, including Petitioners, in which their positions with respect to the Joint Report were stated in full. Petitioners' brief contained alternative proposals "on the basis of the entire record in these proceedings" with respect to, first, the Old Colony "included in the Plan", and second, the Old Colony "excluded from the Plan". These alternative proposals were supported by detailed argument, and Petitioners argued at length in opposition to the terms for joint reorganization contained in the Joint Report. Nowhere in their brief, however, did Petitioners criticize the record before the Commission as inadequate. This fact, together with Petitioners' failure to introduce any evidence at the February hearing and their failure to ask the Commission for further hearings after the filing of the Joint Report, can only mean that they were satisfied then that the record before the Commission with respect to the Old Colony was full and complete.

The Commission issued its Third Supplemental Report and Order in October, 1942 (R. 9753-9862). Nearly half of the Report was devoted to the Old Colony, its properties and the various proposals before the Commission regarding it (R. 9,780-9,800). The Report discussed Petitioners' proposals, as well as those of the Old Colony First Mortgage Trustee, noting that Petitioners

> "introduced no evidence in support of [their] proposals and rely upon evidence relating to the value of the assets of the Old Colony heretofore received in the record."

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[1] Petitioners' statement (Petition, p. 12) that "they were permitted to file briefs only" completely ignores this ruling.

The Order modified in certain respects the terms provided in the Plan for the joint reorganization of the New Haven and the Old Colony. The modified terms were similar to the provisions recommended in the Joint Report. Under them, the holders of Old Colony Bonds would receive $3,289,600 new fixed interest bonds and $2,467,200 new income bonds, after the satisfaction of the New Haven's prior lien claim (R. 9,853-4).

Although over twenty parties petitioned the Commission for modification of its Third Supplemental Report and Order, Petitioners did not (R. 10,130-1). In July, 1943,[1] the Commission issued its Fourth Supplemental Report and Order (R. 10,129-10,227). This denied the petitions for modification and reaffirmed the provisions for joint reorganization approved the preceding October with but one change, which gave the Commonwealth of Massachusetts an option to purchase the Boston Group if, as the result of continuing excessive operating deficits, the reorganized company should discontinue passenger service on the Old Colony (R. 10,210-10,217). The Plan was then certified to the District Court (R. 10,230).

In August, 1943, Petitioners, as well as the other Old Colony interests, filed objections to the modified Plan. The District Court held hearings on these objections in September and October, 1943, after which briefs were filed by all parties. The Court's decision of December, 1943 generally approved the Commission's Plan (R. 10,695-10,763) but held that certain corrections, including an increase in securities issuable to the Old Colony bondholders, should be made. This increase reflected the actual segregated

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[1] After this Court's decisions in the *Western Pacific* and *Milwaukee* cases in March, 1943. *Ecker* v. *Western Pacific Railroad Corporation*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523.

earnings of Old Colony during 1942 and 1943 which, due to war conditions, had exceeded the Commission's estimate by about $2,000,000. This correction was ratified by the Commission's Fifth Supplemental Report and Order issued in February, 1944 (R. 10,833-10,928).[1] On the basis of the record before the Commission regarding the probable market value of the new securities, the combined market value of the $4,398,305 fixed interest bonds and $3,298,728 income bonds distributable to Old Colony bondholders under the Plan is approximately $5,500,000, which exceeds the $5,200,000 combined market value of the securities which would have been so distributable under the Commission's first plan for the joint reorganization of Old Colony and the New Haven.

After the filing of briefs and further objections the District Court held a hearing on the Fifth Supplemental Report and Order in March, 1944, at which the Old Colony parties, including Petitioners, appeared and were heard. The District Court's decision and order approved the Fifth Supplemental Report and Order in all respects (R. 11,024-11,055).[2]

Petitioners were the only Old Colony parties who appealed from the District Court's order. After briefs and argument the Circuit Court of Appeals rendered an opinion in January, 1945 affirming the District Court's decision in all but two respects (R. 11,525-11,545).[3] It held that there was an error of law in the treatment of certain of the New Haven's bank creditors, and, as regards Old Colony, that it was not clear that the Commission had exercised its independent judgment in determining the value of the Old

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[1] Stip. R. I, No. 1.

[2] 54 F. Supp. 631 (1944), Prior S. C. R., vol. A, Ex. 16.

[3] 147 F. (2d) 40 (1945).

Colony properties and the treatment to be accorded the holders of Old Colony Bonds. As to this, the Circuit Court said:

> "It is possible, of course, that the Commission may still adhere to figures which are the same as those of the Joint Report. Such correspondence would not in itself invalidate the Commission's conclusions if it 'shall state fully the reasons for its conclusions,' as required by Section 77(d), and such reasons are not the pressure exerted by the compromise" (147 F. (2d) 40, 50).

The Circuit Court returned the case to the District Court for further proceedings, and gave the District Court leave to remand to the Commission all or any portions of the plan if, in its discretion, it was desirable to have the Commission consider further "any provisions of the plan in addition to those affecting the Old Colony" (147 F.(2d) 40, 53).

The District Court determined that there were no circumstances requiring further consideration by the Commission of any features of the plan other than certain of the provisions affecting the Old Colony, and on February 13, 1945, remanded those provisions to the Commission for further consideration (R. 11,582-3).[1] Petitioners appealed from this order primarily upon the ground that it limited the scope of the Commission's reconsideration in a manner inconsistent with the Circuit Court's opinions of January 2 and 23, 1945. The Circuit Court of Appeals, held, however, that the District Court's order imposed no limitation upon the Commission's reconsideration of the Old Colony questions (R. 11,891-11,914).[2]

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[1] Stip. R. I, No. 1.

[2] 150 F. (2d) 169 (1945), Stip. R. I, No. 11.

After the District Court remanded the Plan to the Commission, Petitioners filed a petition for a further hearing before the Commission.[1] They alleged that there had been material changes in the financial condition and strategic position of the Old Colony during the war period after the close of the hearings before the Commission and that to appraise fairly the value of the Old Colony properties there should be, as summarized by the Commission in its Sixth Supplemental Report:

> "* * * (1) a complete examination of the books of account and records of the principal debtor's trustees for the purpose of determining the adequacy and reasonableness of the credits and charges allocated to Old Colony by the trustees under the segregation formula for the period, January 1, 1941, to date; (2) a complete examination and determination of the amount of the prior-lien claim of the principal debtor's trustees against Old Colony in the light of the earnings of Old Colony for the years 1941 to 1944, inclusive, and a reestimate of earnings for the year 1945 and thereafter; (3) a complete examination of the books of account and records of the principal debtor's trustees for the purpose of determining or forecasting the value of the unsecured claim of Old Colony against the principal debtor for disaffirmance of the Old Colony lease, and the value of the bonds of the principal debtor owned by Old Colony; (4) a complete examination of the books of account and records of Union Freight Railroad Company for the preceding 10 years for the purpose of appraising the value of the the one-half interest of Old Colony therein; (5) a complete examination of the books of account and records of the Boston Terminal Company for the period September 1, 1939, to date, for the purpose of determining the adequacy of the proportions of the

[1] Stip. R. II, No. 23, pp. 19-32.

terminal charges or credits allocated to Old Colony by the principal debtor's trustees; and (6) a re-examination of the earning capacity of the Old Colony operating properties in the light of the foregoing and in the light of the modification of its operating losses by reason of the provisions of the plan relative to Boston Terminal Company which have been affirmed by the circuit court of appeals" (Stip. R. I, No. 3, pp. 11,684-5).

The Commission issued its Sixth Supplemental Report and Order in May, 1945 (R. 11,682-11,703).[1] The Report specifically considered Petitioners' request for a further hearing and the nature of the matters therein specified as requiring further examination by the Commission. It referred to the voluminous evidence already of record in respect to such matters, and pointed out that Petitioners had made no effort to supplement the record at the last hearing before the Commission, although ample opportunity to do so had been given. The Commission concluded that it was neither necessary nor desirable to hold further hearings.

The Commission's Report then discussed in detail the evidence of record relating to the value of the various Old Colony properties. It set forth the amounts of new securities of various classes that would be issuable against the assets of the Old Colony upon the basis of certain assumptions and emphasized that the value of the Old Colony properties and assets should not be determined solely by mathematical calculations, before concluding as follows:

"Upon further consideration and taking into consideration the prior-lien claim of the principal debtor's estate, the uncertainty to which some of the items comprising the non-operating assets of Old Colony are subject, the results of the segregation and

[1] Stip. R. I, No. 3.

> severance studies, the probable future segregated earnings, and the advantages of the settlement of pending claims; considering also the general public interest; we conclude and find that the price to be paid for Old Colony properties, franchises, and assets upon the terms, and conditions and under the limitations, set forth in the modified plan of reorganization approved by us in our report and order of October 6, 1942, as modified and corrected by our reports and orders of July 13, 1943, and February 8, 1944, should be approved'' (R. 11,701).

This Report and Order effected no change whatsoever in the plan embodied in the Commission's Fifth Supplemental Report and Order.

At the hearing before the District Court in July, 1945 on the Commission's Sixth Supplemental Report and Order, Petitioners offered certain evidence relating primarily to the value of the new securities to be issued in the reorganization.[1] This evidence, in general, indicated that in the opinion of the witnesses at the time of the hearing the market values of the proposed new securities were substantially greater than the values indicated by the evidence before the Commission. The District Court considered this evidence and held (R. 11,891-11,914)[2] that it did not constitute a sufficient showing of changed circumstances to warrant returning the proceedings to the Commission for further consideration. After the hearing, the District Court reinstated (Order No. 821)[3] its Order (No. 734)[4] approving the plan as set forth in the Commission's Fifth Supplemental Report and Order, no provision of which had

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[1] Stip. R. II, No. 25, pp. 49-67.
[2] Stip. R. I, No. 11.
[3] Stip. R. I, No. 12, pp. 11,922-3.
[4] Stip. R. II, No. 21, pp. 11-16.

been modified by the Sixth Supplemental Report and Order and entered its further Order (No. 822)[1] confirming the plan under subsection (e) of Section 77.

Petitioners then appealed to the Circuit Court of Appeals, which, after the filing of two sets of briefs and two arguments by counsel, affirmed[2] the action of the District Court, and later denied a petition for rehearing. It is this decision that Petitioners seek to have reviewed by this Court.

ARGUMENT.

POINT I.

The Commission's treatment of the reorganization as a system reorganization of the Old Colony and the New Haven raises no question that need be reviewed by this Court.

Petitioners ask this Court to determine whether the standards of valuation applicable to the Old Colony's properties for the purposes of the Plan do not differ from those approved by this Court in the *Milwaukee*[3] and *Western Pacific*[3] cases, and reaffirmed in the *Denver*[3] case (Questions 1 and 4). They contend that the standards which should be applied in the case of the Old Colony "are those necessary to determine a 'fair upset price' for a sale under

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[1] Stip. R. I, No. 13, pp. 11,924-32.

[2] Stip. R. I, No. 15, pp. 12,655 *et seq.*

[3] Controlling opinions of this Court as to the interpretation of Section 77 are *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943); *Reconstruction Fin. Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 (1946) and *Insurance Group* v. *Denver & R. G. W. R. Co.*, 91 L. ed. 436 (1947), herein referred to as the *Milwaukee*, *Western Pacific* and *Denver* cases, respectively.

Section 77(b)(5)" (Questions 2 and 3) and that such standards are "those set forth in *First National Bank* v. *Flershem*", 290 U. S. 504 (1934) (Question 3), which involved an equity receivership of a debtor that was in fact solvent in both the bankruptcy and the equity senses.

A. The standards of valuation approved by this Court in the *Milwaukee* and *Western Pacific* cases are applicable to the Old Colony for the purposes of its reorganization as a part of the Plan for the New Haven.

Section 77(e) directs that the Commission shall make any necessary determination of "the value of any property for any purpose under this section". This Court in the *Milwaukee* and *Western Pacific* cases has held that valuation is exclusively the function of the Commission, as to which "judicial reexamination was not considered necessary". Despite the emphasis put upon earning power for valuation purposes by Section 77(e), with no reference in the statute to a cash valuation for any purpose, Petitioners urge that the provisions for inclusion of the Old Colony properties in the joint reorganization should reflect the "absolute" "fair cash sale value" of those properties. Such a procedure would call for creation of completely new standards of valuation.

In discussing the manner in which the Commission must discharge its duties in regard to valuation, this Court has expressly recognized the impossibility of placing exact dollar valuations upon properties for reorganization purposes and has clearly indicated the latitude of judgment which must be exercised by the Commission in this regard. Thus in the *Milwaukee* case, this Court has said (318 U. S. 523, 561):

> "The problem in such a case is not a simple one. The contribution which each division makes to a system is not a mere matter of arithmetical computa-

> tion. It involves an appraisal of many factors and the exercise of an informed judgment. Furthermore, an attempt to put precise dollar values on separate divisions of one operating unit would be quite illusory."

and at page 565:

> "A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process."

The Court's statements in the *Western Pacific* case are to the same effect (318 U. S. 448, 472):

> "The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible."

and at page 483:

> "Under such circumstances the lack of a valuation in dollars is immaterial. The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities."

In the *Denver* case this Court has recently reiterated the same principles (91 L. ed. 436, 443):

> "When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal

> are multiplied by the necessity of looking into the future to estimate earnings."

As a basis for advocating this radical departure from the principles heretofore established, Petitioners point out that Old Colony holds title to its properties as a separate corporate entity and that as a result of disaffirmance of the Old Colony lease coupled with continued operation of the properties by the New Haven Trustees for the account of Old Colony pursuant to Section 77(c)(6) Old Colony has certain claims against the New Haven and the New Haven has a prior lien claim against the Old Colony. These factors are incidental only and do not alter the basic fact that in this reorganization Old Colony is on the same footing for valuation purposes as a divisional lien of the New Haven.

There is but a single reorganization proceeding here. The Old Colony is a party to that proceeding under Section 77(a) which provides:

> "Any railroad corporation the majority of the capital stock of which * * * is owned * * * by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition * * * stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; * * *."

That the legislative purpose of this provision is to further the continuity of system operations seems apparent. Simplification of railroad capital structures generally requires the elimination of many if not all divisional liens. In some cases the principal debtor will have acquired title to the divisional properties with or without assuming the liens thereon and in others, as in the case of Old Colony, title to the divisional properties may have remained in a subsidiary.

The provisions of Section 77(a), which is operative only in instances involving separate corporate entities, were designed to eliminate legal impediments to a system reorganization in the latter type of case. Different incidental problems such as the liability of the parent for obligations of the subsidiary and the settlement of claims as between parent and subsidiary may exist, but nowhere in the statute is there any indication that the Commission is required to apply one standard of valuation in instances where divisional properties are owned directly by the principal debtor and another where the title is in a subsidiary. The provisions of Section 77(e) which require the Commission to value any property for any purpose with emphasis primarily upon earning power apply to subsidiary debtors with the same force as to principal debtors.

Petitioners contend that the application to the Old Colony of the valuation standards used in the *Milwaukee* and *Western Pacific* cases "appears to be plainly in conflict with the views of this Court" in *Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156 (1941). But that case had nothing to do with valuation for the purposes of a reorganization plan, much less the question whether various standards of valuation are required by Section 77. It involved solely the question whether Section 77(c)(6) required the New Haven Trustees to advance funds of the New Haven estate for the payment of certain Old Colony obligations when their payment was not essential to the continued maintenance of railroad service on the Old Colony lines.

Petitioners base their argument for a different standard of valuation wholly upon the theory that the plan requires a "sale" of the Old Colony properties. They rely upon one of the optional methods for execution of the plan provided in Section 77(b)(5), namely, a "sale at a fair upset price", ignoring completely the preceding clauses which permit

the "transfer * * * of all or any part of the property of the debtor to another corporation" and "the merger or consolidation of the debtor with another corporation". The connotation of the word "sale" as distinguished from "transfer" or "merger or consolidation", contended for by Petitioners, has significance only if there be a willing purchaser. Such is not the case here. The record in this case has demonstrated that the Old Colony is unable to earn its operating expenses, and for this reason its reorganization as a part of the New Haven was bitterly opposed by New Haven creditors. In the Commission's (Division 4) original Report in March, 1940, the majority determined that the Old Colony should not be reorganized as a part of the New Haven on the grounds, among others, that it would be unfair to the creditors of the New Haven, but Commissioner Eastman dissented, stating (R. 8001-2):

> "The Commission, however, has both the right and the duty, in passing upon the reorganization plan, to consider whether or not the public interest requires that these properties remain parts of one system and that provision to that effect be made in the plan."

At the reopened hearings before the full Commission, Commissioner Eastman's view prevailed and the Commission's Report of February, 1941 required reorganization of the Old Colony as a part of the New Haven. At the outset of that Report the Commission stated (R. 8050):

> "The Commonwealth of Massachusetts, and those parties who may be designated as representing the public, contend that not only is the acquisition of the Old Colony properties and the operation of all of its lines by the principal debtor justified financially, but that any plan not providing for the inclusion of the Old Colony as a part of the principal debtor's

> system would be incompatible with the public interest."

and in the course of its consideration it pointed out (R. 8063):

> "The conditions under which the Old Colony operates are such that it cannot endure the present heavy loss from passenger service. This loss must be eliminated or reduced to relatively small proportions, if a sound, feasible, and fair plan of reorganization for the Old Colony is to be approved at this time. Nor can the property be operated successfully, except as a part of some larger railroad system, even if such relief is obtained."

The District Court withheld approval of that plan since, in view of the Old Colony's operating deficits, it did "not feel justified in imposing an involuntary merger upon the parties upon the terms proposed" (R. 8956). But after the District Court hearings the New Haven creditors withdrew their opposition to a joint reorganization and joined with the other parties in attempting to evolve a plan that would give effect to the Commission's insistence upon a system reorganization. Thus, the basic controversy as to whether or not the New Haven and Old Colony should be reorganized jointly, which had lasted for over four years, had been removed prior to Petitioners' intervention in the proceedings. And contrary to the contention of the Petitioners, it has been urged in this proceeding from the time of the early hearings before the Commission that Old Colony is merely one portion of the New Haven and should be reorganized as such.[1] This view was ultimately adopted by the Commission (R. 10,908).

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[1] See, for example, brief dated January 15, 1938 before the ICC, Mutual Savings Bank Group, pp. 75 *et seq.*

B. Section 77(b)(5) does not require the fixing of an "upset price" for the Old Colony's properties for the purposes of the Plan.

Petitioners ask this Court to review the question whether Section 77(b)(5) requires the fixing of an "upset price" for the Old Colony properties (Questions 2 and 3). If the answer to that question should be in the affirmative, Petitioners also ask this Court to determine whether the fixing of an "upset price" necessitates finding the "fair cash value" of each item of the Old Colony properties and the "probable market or cash value" of the securities distributable under the Plan to the Old Colony bondholders (Question 3). If the fixing of an "upset price" is not required by Section 77(b)(5), then consideration of the second question mentioned above is unnecessary.

The Circuit Court of Appeals, one judge dissenting, held that the provision of Section 77(b)(5) permitting the sale of the property of a debtor at an "upset price" is "optional, not mandatory" and consequently that even if the provisions of the Plan which provide for the transfer of Old Colony's properties to the reorganized New Haven, the discharge of the New Haven estate's prior lien upon those properties, and the issuance of securities of the reorganized New Haven to Old Colony bondholders, could properly be described as a "sale", nevertheless, the statute does not require the fixing of an "upset price".

The Circuit Court's interpretation of Section 77(b)(5) is sustained beyond any question by the specific language of that subsection, by its legislative history, by its relationship to other provisions of Section 77, and by the interpretation placed upon it in other cases under Section 77. The pertinent part of Section 77(b)(5) provides that the plan of reorganization

> "shall provide adequate means for the execution of the plan, which *may* include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, *the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price,* the distribution of all or any assets, *or the proceeds derived from the sale thereof,* among those having an interest therein, * * *." (Emphasis added.)

The only mandatory part of this provision is the requirement that the plan "shall" provide adequate means for its execution. The remainder of clause (5) is permissive: the "means" chosen "may" include any of the methods listed. The statutory list of methods is not even exclusive, for the first paragraph of subsection (b) ends with a provision that the plan "may include any other appropriate provisions not inconsistent with this section."

The legislative history of clause (5) shows that the italicized language above was intended to add an additional, alternative method for carrying out a plan. Clause (5) was not contained in Section 77 as originally enacted in 1933, but was added when Section 77 was amended in 1935. The 1935 amendments were contained in H. R. 8587, which in turn was derived from H. R. 6249 recommended by Joseph B. Eastman, Federal Coordinator of Transportation. As this Court noted in the *Denver* case (90 L. ed. 1134, 1153-1154), one of the major objectives of the 1935 amendments was to provide a method for dealing with the problem of dissenting creditors. This was accomplished by amending subsection (e) of Section 77 to permit the con-

firmation of plans by the courts over the objections of creditors under the so-called "cram-down" provision, thus eliminating the need for foreclosure sales involving the fixing of "upset prices", which was the procedure employed in equity receiverships to carry out plans of reorganization. The bill (H. R. 6249) sponsored by Commissioner Eastman contained the "cram-down" provision, but did not contain any provisions regarding sales at upset prices. The italicized language above was inserted after the hearings on H. R. 6249, during which several witnesses expressed concern over the constitutionality of the proposed "cram-down" provision, one witness[1] specifically urging the inclusion of a permissive, alternative provision authorizing foreclosure sales at not less than "fair upset prices".

Under Section 77, as so amended, the sale-at-an-upset-price provision is thus an additional, alternative means for the execution of the plan. It is in addition to the other specified methods of passing title to the properties of a debtor railroad to another corporation, such as "transfer", "merger" and "consolidation", the first two of which more accurately describe the provisions dealing with Old Colony in the Plan. But its legislative history shows, and the draftsmen of the 1935 amendments later confirmed,[2] that the sale-at-an-upset-price provision was primarily intended as an alternative for the untested "cram-down" procedure of subsection (e). To this extent it carried into the amended

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[1] C. M. Clay, then counsel for the Railroad Division of Reconstruction Finance Corporation, which was at the time the largest single holder of railroad securities. *Hearing before House Committee on the Judiciary on H. R. 6249*, 74th Cong., 1st Sess. (1935) 130.

[2] Leslie Craven and Warner Fuller, in *"The 1935 Amendments of the Railroad Bankruptcy Law"* (1936) 49 Harv. L. Rev. 1254, 1268-1272.

Section 77 the "artificial procedural technique used to drive creditor and equity interests into the reorganization plan".[1]

The foregoing is consistent with the interpretation that has been placed upon subsection (b)(5) by the Commission in other cases under Section 77. For example, in *Spokane International Ry. Co. Reorganization,* 233 I. C. C. 157 (1939), the Commission approved a plan containing a permissive sale-at-an-upset-price provision, saying, with respect to the pertinent part of subsection (b)(5):

> "The purpose of the sale provision as contained in the bondholders' plan, as stated by its proponents, is to secure to the reorganized company property which will be more nearly immune from attack by nonassenting classes of creditors upon possible grounds of unconstitutionality of the provisions in section 77 permitting confirmation of a plan of reorganization other than according to principles applicable to compositions."

The sale-at-an-upset-price provisions adopted by the Commission all begin substantially as follows:

> "If so ordered by the court, the plan may be executed by a sale or sales, at not less than fair upset prices to be fixed by the court * * *." *Spokane International Ry. Co. Reorganization,* 233 I. C. C. 157, 184.

Thus, even in those cases where the Commission has exercised its option and included such provisions in its approved plans, it has been unwilling to make the provisions manda-

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[1] *Op. cit.* 1271. Neither in equity receivership nor under Section 77 as originally enacted had the upset price device furnished an adequate basis for the adjudication of property rights dependent upon the value of assets. The fixing of an upset price never purported to be an actual determination of value. The 1935 amendments of Section 77 sought to remedy this situation, and the deficiencies of the valuation provision of Section 77 as originally enacted, by placing the determination of value for reorganization purposes in the hands of the Commission. The determinations of the Commission then become the basis for the exercise by the Courts of their power under the "cram-down" provision.

tory but has left it to the courts to decide whether or not the plans should be executed by means of sales at upset prices. The option to include or not to include such a provision is specifically given the Commission by subsection (b)(5), and the Commission was wholly within its rights under Section 77 in not including such a provision in its Plan for the New Haven.

While ostensibly Petitioners' argument denies the unitary character of the sale-at-an-upset-price provision in subsection (b)(5) and insists that the critical words are "the sale" and that whenever a sale is involved an "upset price" must be fixed, the real significance of their argument is that by it Petitioners hope to undo the District Court's confirmation of the Plan as to Old Colony under the "cram-down" provision of subsection (e), the constitutionality of which this Court upheld in the *Denver* case.[1] Consequently, it would be a clear distortion of Congressional intent if Petitioners should be permitted to use the sale-at-an-upset-price provision of subsection (b)(5), which was intended as an alternative to the "cram-down" provision, as the means of nullifying the latter provision.

We do not believe it necessary to discuss further Petitioners' contentions that an upset price must be fixed because the Plan's provisions for Old Colony amount to a "sale", and that in fixing an upset price the principles to be applied are those set forth in *First Nat. Bank* v. *Flershem,* 290 U. S. 504 (1934). For the reasons stated at length under subdivision A of this Point, it is clear that those provisions do not amount to a "sale" and that the Plan is a single comprehensive plan of reorganization under which the Old Colony is being reorganized, to quote the Commission's Order (R. 10,908), "as a part of" the reorganization of the New Haven.

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[1] 328 U. S. 495.

POINT II.

Neither Petitioners' criticism of the treatment of the New Haven's prior lien claim nor their contentions with respect to a deficiency on the Old Colony Bonds and the commingling of Old Colony's assets by the New Haven raises any question that need be reviewed by this Court.

Petitioners assert that if the Plan is properly one for system reorganization the New Haven's prior lien claim should be disregarded rather than satisfied (Question 5), and that the Old Colony Bonds should have an unsecured "deficiency claim" against the New Haven properties (Question 6). They also assert that the New Haven has so commingled the Old Colony's assets with its own as to be liable for the Old Colony's obligations (Question 7).

There is no basis for the contention that the New Haven's prior lien claim should be treated as a "system obligation" and disregarded rather than satisfied. This claim arose out of the reorganization proceedings as did the Old Colony's $47,000,000 breach of lease claim against the New Haven which, together with other claims against the New Haven resulting from the reorganization, have been characterized by Petitioners as the most important of Old Colony's assets. But for the existence of the separate corporate entities, those claims would not have existed on either side. As shown in Point I, Section 77(a) contemplates the joint reorganization of system properties even though owned by separate corporate entities. This does not mean, however, that claims between such entities must not be dealt with. The prior lien claim is based upon the District Court's order directing the New Haven, pursuant to the provisions of Section 77(c)(6), to operate the Old Colony's

properties for the account of the Old Colony. This did not call for the operation of the Old Colony as a separate railroad, but merely for a separation of the results of the system operation. Section 77(c)(6) makes no distinction between those cases where the lessor is a subsidiary, which is frequent in large railroad systems, and those where the lessor is not a subsidiary. The conclusion that Sections 77(a) and 77(c)(6) taken together authorize joint reorganization in cases where a subsidiary's properties have been operated for the account of the subsidiary under a disaffirmed lease, does not seem to present any question of statutory interpretation.

If the Old Colony had been required to operate its own properties, the funds necessary to make up its operating deficit, which constitute the prior lien claim, would have had to have been borrowed, presumably on an issue of trustees' certificates. If, under these circumstances, the Commission had determined that the public interest demanded a merger of the properties of the two roads, the existence of the trustees' certificates would not have barred joint reorganization. It would, however, have been necessary for the plan for the joint reorganization to deal with them in a manner consistent with their prior lien position and the result would have been the same as that in the present case.

As to Petitioners' contention regarding a so-called "deficiency claim", it need only be pointed out that by order entered in the District Court on February 4, 1938, claims against the New Haven for the principal of the Old Colony Bonds filed by the Old Colony Mortgage Trustee and the Old Colony bondholders were dismissed and disallowed by the District Court (R. 3,923-33; see also R. 3,964-66). The District Court also held that any damages for failure upon the part of the New Haven to pay interest on the

Old Colony Bonds was reflected in the $47,000,000 breach of lease claim (R. 6276).

As to the foregoing items, Petitioners would disregard the corporate entities for the purpose of asserting a deficiency claim against the New Haven and of disregarding the New Haven's prior lien claim, while at the same time recognizing those entities for the purpose of retaining their $47,000,000 breach of lease claim, their claim against Bankers Trust Company, and the $3,600,000 principal amount of New Haven First and Refunding Mortgage Bonds together with interest paid thereon in cash, all of which were acquired by the Old Colony through recognition of its separate corporate entity.

Petitioners also claim, for the first time in this proceeding, that the New Haven has so commingled the assets of the Old Colony as to become responsible for the latter's obligations. This clearly is not a claim which should, in the first instance, be considered by this Court. Furthermore, all of the New Haven's obligations under the lease with respect to the maintenance and replacement of the Old Colony's properties, roadway and equipment, were considered in fixing the damages for breach of lease. Any damages which might have resulted to the Old Colony as a result of any commingling of its assets with those of the New Haven were assessed and are reflected in the $47,000,000 damages against the New Haven for the breach of the Old Colony lease. In addition to such damages reflected in the breach of lease claim, the Old Colony also acquired the $3,600,000 of First and Refunding Bonds as a result of the failure to return certain steamship equipment leased to the New Haven.

POINT III.

Petitioners raise no question concerning the Sixth Supplemental Report that need be reviewed by this Court.

Petitioners attack the Commission's Sixth Supplemental Report on several grounds. They contend it is arbitrary and capricious and inadequately states the Commission's reasons for its findings (Question 8), that the Commission did not treat as an Old Colony asset $792,000 cash paid as interest on Old Colony's $3,600,000 First and Refunding Bonds (Question 9), and that the Commission incorrectly dealt with the value of Old Colony's claim against Bankers Trust Company (Question 10). Petitioners also contend that the Commission gave inadequate consideration to the probable market value of the new securities (Question 11).

A. The Commission's approach to the Sixth Supplemental Report.

In developing the terms of the joint reorganization and the award of securities to be made to the Old Colony bondholders the problem before the Commission was analogous to that of determining the treatment to be accorded the holders of any of the New Haven divisional mortgage bonds. The problem was complicated but not distinguished by the New Haven's prior lien claim of $10,500,000 against Old Colony and the fact that Old Colony, in turn, had certain assets acquired by it in the course of the proceedings in addition to its railroad lines. Because the New Haven's prior lien claim is preferred to all Old Colony assets, the Commission was required to satisfy itself, in developing the terms of the joint reorganization, that the Old Colony

assets are of sufficient value to satisfy that claim. In this process, the Commission made tentative appraisals and noted the evidence and conflicting claims as to the value of those assets, including evidence of market values of the New Haven securities which might be issued in respect thereof. It then made a finding of the over-all value of the aggregate of the Old Colony's assets for purposes of a system reorganization.

The valuations which Petitioners now cite as examples of the Commission's failures are the tentative valuations assigned to the Old Colony assets in the process above described. That these valuations were tentative is clearly shown by the Commission's statements in its Sixth Supplemental Report (R. 11699-701) where, among other things, the Commission expressly recognized the impossibility of making exact mathematical calculations (R. 11700):

> "The value of Old Colony properties and assets should not be determined solely by mathematical calculations since it is essentially a matter of judgment based upon a consideration of intangible as well as tangible elements and a general knowledge of system requirements."

B. The Sixth Supplemental Report is not arbitrary and capricious and adequately states the Commission's reasons for its findings.

In view of the history of these proceedings and the exhaustive record relating to the Old Colony properties, the Commission clearly had before it sufficient information and data with respect to the Old Colony properties. The Commission considered all of the testimony relating to the value of the Old Colony's railroad properties and fully

analyzed the conflicting claims and the evidence of value as to the non-railroad properties.

As this Court has recognized, such an appraisal is not a simple problem. The Old Colony contribution in the form of operating and other properties could not be appraised by mathematical computation. A listing and summation of all of these items at various dollar values would, as this Court said in the *Milwaukee* case, "necessarily have to be based on extensive assumptions of unprovable validity" and any attempt to do it would simply "present an apparent certainty in the formulation of the plan which does not exist in fact". In the *Western Pacific* case this Court decided that no detailed valuation of operating and non-operating property need be made by the Commission in formulating a plan. Notwithstanding this, Petitioners and the dissenting Judge in the Circuit Court of Appeals have chosen to characterize the Commission's Sixth Supplemental Report as arbitrary and capricious, relying on the fact that the net result in the Sixth is the same as in the Fifth Supplemental Report. This argument is of no significance because the Circuit Court of Appeals' reversal after the District Court's first approval of the Plan did not require the Commission to reappraise the Old Colony's properties. That reversal was solely on the ground that the Commission had not made it clear that the figures in question represented its own judgment; it was not due to any holding that the figures in the Commission's Fifth Supplemental Report were the same (excepting approximately $2,000,000 additional principal amount of bonds allocated to Old Colony to reflect 1942 and 1943 actual operating results) as those in the Joint Report. There is no statutory prohibition against the Commission's adopting proposals of parties, provided, in

the exercise of its independent judgment, the Commission considers such proposals reasonable. The Sixth Supplemental Report makes it clear that the Commission in the exercise of its independent judgment found the allotment to the Old Colony to be fair, thereby discharging its duty under Section 77.

Nor was the Sixth Supplemental Report deficient in its statement of reasons for the findings made. This Court has emphasized the intangible factors in the valuation process. It has also had occasion to emphasize the importance of the element of informed judgment in the reorganization process and has pointed out that the Commission's ultimate conclusion is to be taken as its significant finding. In the *Milwaukee* case the Court said (318 U. S. 523, 539):

> "Reasons which underlie the expert opinion which the Commission expresses on a plan of reorganization under §77 need not be marshalled and labelled as findings in order to make intelligible the Commission's conclusion or ultimate finding or to make possible the performance on the part of the courts of the functions delegated to them. Here, as in other situations [citing cases] it is the conclusion or ultimate finding of the Commission together with its reasons and supporting data which are essential. Congress has required no more."

Under the controlling decisions, therefore, it is clear that the courts cannot lawfully require formal specific appraisals of individual items of property. If the Commission's Reports indicate a consideration of all significant items of property and of the evidence or contentions as to the value thereof, as is the case here, its obligation to state its reasons and supporting data has been discharged.

C. The Commission correctly disposed of the problem of accrued interest on the Old Colony's New Haven First & Refunding Bonds.

In determining the securities to be allocated to the Old Colony, the Commission treated as an asset of the Old Colony the $3,600,000 principal amount of First & Refunding Bonds, together with $379,000 of unpaid interest. Petitioners urge, however, that the Commission's analysis of the terms of the merger does not make any separate allocation for the $792,000 of interest which had been paid and which was on deposit in a special account.

The Commission was well aware of this item and treated it, also, as an Old Colony asset. In developing the terms of merger as expressed in the Commission's Third Supplemental Report, the Commission said (R. 9790-1):

> "The Old Colony parties contended that the amount of the prior lien should be adjusted downward to reflect those portions of the full Boston Terminal Company charges which would not be required to be paid by the provisions of section 3 of the joint report, the amount of cash reserved in respect of the $3,600,000 first and refunding bonds owned by the Old Colony as the result of interest payments during this proceeding and the amount of cash which will probably be so reserved during 1942 and 1943 in view of the estimated probable amounts of interest to be paid thereon during those years, and suggested that a fair compromise of all of these items would be a total deduction of $424,000, leaving a balance of the prior lien, as of December 31, 1943, of $10,076,000. The principal debtor parties contended that the net principal amount of the prior lien should be increased by between $2,500,000 and $3,000,000 to cover interest on the prior lien claim, a matter which was reserved by the court for future determination. After considering the different contentions, it was agreed

that the amount of the prior lien to be used in the negotiations would be $10,500,000."

Petitioners refer to parts of the Sixth Supplemental Report to establish their contention that the $792,000 of interest was not taken into consideration by the Commission. But the Sixth Supplemental Report expressly embodies the previous reports of the Commission and, consequently, the discussion of the treatment of this asset given above (R. 11694).

No party has questioned the propriety of crediting to the Old Colony the $792,000 of interest, and under these circumstances a formal determination as to the ownership of this asset is hardly necessary. The situation here is wholly unlike one involving an actual controversy, such as that relating to the "Pieces of Lines East" in the *Milwaukee* case, to which Petitioners refer.

D. The Commission correctly dealt with the value of the Old Colony's claim against the Bankers Trust Company.

Among the assets of Old Colony are two related claims arising out of the disaffirmance of the New Haven's lease of its properties. One is the $47,000,000 breach of lease claim against New Haven and the other is a claim against the Bankers Trust Company of New York, as Trustee of the New Haven First and Refunding Mortgage, originally stated in the principal amount of $13,000,000, which has never been tried out. The claim against Bankers Trust Company is based upon the theory that when it accepted an assignment of the lease of the Old Colony lines as a part of the security for the First & Refunding Mortgage, the Trustee engaged to meet certain of the covenants of this lease. This is a novel application of the law of landlord and tenant and the theory that the assignee of a lease may be liable on

the covenants thereof has never been applied to the trustee of a corporate mortgage accepting an unexpired lease as a part of the security for a mortgage. Should the claim against Bankers Trust Company succeed, Bankers Trust Company would be entitled to look to New Haven for indemnification under the covenants of the mortgage. Should the claim succeed and should the Old Colony recover a part of its damages from the Trust Company the claim against New Haven should be to that extent reduced to avoid a double recovery.

This claim is one of the Old Colony's most doubtful assets. Being based upon a novel application of the law it may be worth the amount claimed and again it may be worth nothing. In considering what credit should be allowed for this asset in the merger, the Commission noted a compromise value of the claim advanced by the Old Colony Railroad at $4,000,000 and an opposing compromise value of the claim put forward by the principal debtor valuing it at not more than $2,500,000. It also noted the contention of the Insurance Group of New Haven creditors that the claim had no value at all. In its test valuations the Commission selected $3,500,000 as permissible valuation for the claim (R. 9791-2).

The Commission recognized that any recovery against Bankers Trust Company must be set off against the $47,000,000 breach of lease claim in endeavoring to reach a value of the two assets. Petitioners claim the Commission incorrectly made this set-off. But this misconstrues the Commission's Sixth Supplemental Report and ignores the previous Supplemental Reports which are incorporated therein by reference. In its discussion of the treatment of this claim in its Third Supplemental Report the Commission shows that it was fully aware of the contention that

only the settlement value, and not the full amount, of the claim against the Bankers Trust Company should be deducted from the $47,000,000 breach of lease claim (Exhibit R. 9792). Also, in the Sixth Supplemental Report (R. 11682, 11696) the discussion of the amount of the deduction is phrased in the conditional. There the Commission was endeavoring to arrive at a tentative valuation of the breach of lease claim, thus reduced, for the purpose of ensuring that the prior lien claim of the New Haven's Trustees was satisfied. Both of the items involved were tentative in amount and the existence of any value for the Bankers Trust Company claim was uncertain. The valuation of these intangibles was but one step towards the over-all valuation of the Old Colony properties which is solely the function of the Commission.

E. The Commission gave adequate consideration to the probable market value of the New Haven securities to be issued under the Plan and acted upon a proper record.

Petitioners' claim (Question 11) that either the Commission failed entirely to make adequate findings as to the value of New Haven reorganization securities, which were taken in satisfaction of the New Haven's prior lien claim or, if the Commission made such findings, they were based on a record so inadequate as not to support them.

It is unnecessary to repeat a description of the Commission's approach in appraising the Old Colony assets and the way in which it made test valuations in order to compare the Old Colony assets and the prior lien claim and assure itself that no injustice was done to the New Haven and Old Colony creditors. It is these test valuations which the Petitioners now attack as insufficient findings. This Court, however, in its *Milwaukee* opinion, has

ruled that no such cash appraisal of property surrendered and of new securities allotted, is necessary (318 U. S. 523, 565):

> "A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. * * * It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered."

See also the *Western Pacific* case, 318 U. S. 448, 486.

The test valuations of the new New Haven securities used by the Commission reflect the testimony of Mr. Pierpont V. Davis at the February, 1942 hearings. This witness testified as to a probable seasoned market value of the new New Haven securities and not as to their market value in 1942 as claimed by Petitioners. While the Petitioners were present at these hearings they offered no attack upon his qualifications or on his opinion and offered no contradicting expert testimony. It was only after a period of war earnings had resulted in a boom in the market prices of securities, which has since subsided, that the Petitioners sought to amend the record and put in evidence as to market prices to contradict Mr. Davis. It will be obvious to the Court that evidence of market prices, which fluctuate daily, offers no valid criticism of the evidence of seasoned values used by the Commission in its test valuation. It is a fundamental principle enunciated by this Court in *I. C. C.* v. *Jersey City*, 322 U. S. 503 (1944), that it is for the Commission to determine the adequacy of the record before it with respect to the appraisal of such

matters as those that Petitioners bring into question. The Commission, in its Sixth Supplemental Report, denied Petitioners' belated request that the record on this point be reopened for the presentation of further evidence and by this determination ruled that the record, in its opinion, was adequate to make its findings.

POINT IV.

The procedure followed by the Commission and the District Court gives rise to no question that need be reviewed by this Court.

Petitioners ask this Court to review the procedure followed by the Commission and the District Court, and to determine whether or not that procedure complied with certain of the provisions of subsections (d) and (e) of Section 77.

A. The Commission's procedure with respect to hearings met the requirements of Section 77 and adequately safeguarded Petitioners' interests.

Petitioners contend that the Commission's procedure with respect to hearings was improper on two occasions, (i) when it did not continue the February, 1942 hearings after the filing of the Joint Report (Question 12), and (ii) when it denied Petitioners' request for further hearings after the District Court's remand of the Old Colony provisions pursuant to the mandate of the Circuit Court of Appeals (Question 13).

(i) After the Plan had been referred back to the Commission by the District Court in December, 1941, the Commission's hearing, upon due notice, extended over a period of three days. Counsel for Petitioners appeared at this

hearing pursuant to leave granted upon their petition to intervene for the purpose of presenting evidence, cross-examining witnesses and participating in the proceedings generally. After all the evidence was presented, and Petitioners, electing to rely upon the record theretofore made, had presented none (R. 9,797), it was ruled that the record would be kept open for the sole purpose of receiving a proposal by the Court Committee as to the securities issuable with respect to the Old Colony properties—no specific proposal in this regard having been offered by any party during the course of the hearing. During the colloquy preceding this ruling the question of further hearings was specifically raised. Director Sweet, of the Commission's Bureau of Finance, who was presiding, recognized the possibility that after receipt of such proposal some party or parties might wish to offer further evidence, and not wishing to foreclose that possibility stated:

> "If anybody is advised at that time [after receipt of the Committee's proposal] that there should be some further hearings in this case, I think that that party would have a right to petition the Commission for a further hearing, if it seemed to be necessary. Whether or not such a petition would be granted depends upon the circumstances at that time." (ICC R. 4330-1)

He also stated:

> "I think fifteen days time would be sufficient after the receipt of the [Committee's] proposals for the parties to determine what they want to do about them. They could file briefs if briefs seemed to be sufficient. If, in the opinion of any of the parties, anything in addition to filing briefs should be necessary, fifteen days would afford ample time for

them to make any representations they care to make to the Commission." (ICC R. 4333-4)

Thus it was left to each party to determine whether the record was adequate for his case after having examined the Committee's proposal. This was a more reasonable course than to compel counsel to reconvene at a formal hearing if none had evidence to present, and counsel for Petitioners made no objection to this ruling. Petitioners now claim that they "desired and assert they had a right" (Brief, p. 44) to an opportunity to submit evidence, to cross-examine witnesses and to argue orally with respect to the Committee's proposal, but despite Director Sweet's invitation they made no request for a further hearing.

Subsection (e) of Section 77 provides that if the District Court shall not approve the plan he may refer the proceeding back to the Commission for "further action" and that the Commission thereupon shall proceed "to a reconsideration of the proceedings" under the provisions of subsection (d). Since Petitioners neither objected to Director Sweet's ruling nor petitioned for further hearing their position must be that the reference in subsection (e) to subsection (d) means that any departure from the procedure prescribed by subsection (d) constitutes a defect voiding the whole procedure. Such is not the case. The direction in subsection (e) that the Commission shall proceed to a "reconsideration of the proceedings" is not a requirement that each step specified in subsection (d) be retraced. The nature of the "further action" to be taken by the Commission rests in the sound discretion of the Commission to be exercised in the light of the reasons for the District Court's failure to approve the plan. *In re Chicago, M., St. P. & P. R. R. Co.*, 145 F. (2d) 299, *cert. den.* 324 U. S. 857. The only question open to the Petitioners in

this regard is whether the course followed by the Commission in this case adequately safeguarded their interests. The answer to this question has been supplied by Petitioners' own actions in registering no objection to the Commission's ruling at the hearing and in failing to avail themselves of the invitation extended by the Commission to petition for further hearings if they had additional evidence to offer.

Furthermore, Petitioners' entire case on this point depends upon their contention that the Committee's proposal constituted a comprehensive plan of reorganization for the Old Colony, following the filing of which a hearing was necessary under subsection (d). For the reasons stated under Point I, we believe the Circuit Court of Appeals was correct in holding that there is but one Plan for a system reorganization.

Petitioners' contention that the Commission's procedure following the February, 1942 hearings was not in accordance with Section 77 is, in the light of the foregoing, hardly a basis for review by this Court.

(ii) The second occasion upon which Petitioners claim the Commission failed to comply with the requirements of subsections (d) and (e) arose after the District Court had remanded the Plan to the Commission in accordance with the mandate of the Circuit Court of Appeals. In arguing that the "further action" and "reconsideration" required of the Commission by subsection (e) upon this remand included further hearings, Petitioners seek to distinguish the instant case from the holding of the Circuit Court of Appeals for the Seventh Circuit on the second appeal in the *Milwaukee* case (*In re Chicago, Milwaukee, St. Paul & P. R. Co.*, 145 F. (2d) 299, *cert. den.* 324 U. S. 857). They state that a distinction arises because in that *Milwaukee*

case the Commission did hold hearings with respect to the remanded particulars of the Plan. In that case this Court had held that a controverted question of lien must be settled and that the Commission must determine what compensation should be given to senior creditors in order to justify participation in the Plan by junior creditors. Since it appeared from the record that neither of those questions had received any consideration initially by the Commission, the necessity for enlargement of the record in that case is apparent. In the instant case the Circuit Court of Appeals did not find that the Plan was defective or that the record was inadequate. Its reversal of the District Court's order was based solely upon expressions appearing on the face of the Commission's Report. By its opinion, which Petitioners now seek to have this Court review, the Circuit Court of Appeals has held that its earlier reversal required nothing more than that the Commission should make additional findings.

The Commission, in considering the matters specified in Petitioners' request for a further hearing and in refusing to grant such petition, gave consideration to the record theretofore made before it and decided that such record was adequate for the purpose of making the necessary findings. This action by the Commission was in accordance with the principle enunciated by this Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514-15 (1944) that an administrative body must judge for itself the adequacy of its record.

The procedure followed by the Commission clearly falls within this Court's definition of proper administrative procedures in *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373-4 (1939) as follows:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the

> merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. * * *
>
> "If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard."

Petitioners' reference to the provisions of the National Labor Relations Act does not explain away the force of the foregoing statement by this Court, since that statement relates to general appellate practice apart both from administrative procedure and the National Labor Relations Act.

Furthermore, subsection (d) requires hearings only after the filing of a plan, an action which was not necessary and was not taken after the proceedings were referred back to the Commission by the District Court. Thus, the condition precedent to the statutory requirement of hearings did not occur.

B. The procedure of the Commission and the District Court with respect to voting and confirmation met the requirements of Section 77.

Petitioners contend that the Old Colony bondholders' rejection of the Plan approved by the Commission in its Fifth Supplemental Report and Order was reasonably justified (Question 14), that Section 77(e) required the Plan reapproved by the Commission in its Sixth Supplemental Report and Order to be submitted for the vote of the Old Colony bondholders (Question 15), and that the District Court had no power to confirm the Plan because a voting majority of the Old Colony bondholders had rejected it (Question 16).

As previously stated, after the District Court approved the Plan as contained in the Commission's Fifth Supplemental Report and Order of March, 1944, the Commission submitted it to creditors entitled to vote for acceptance or rejection. In December, 1944 the Commission certified to the District Court the result of such voting, its certificate showing that the Plan had been accepted by all classes of creditors voting except the Housatonic bondholders and the Old Colony bondholders (R. 11,511). In January, 1945 the Circuit Court of Appeals reversed the District Court's order approving the Plan in so far as Old Colony was concerned, holding that it was not clear the Commission had exercised its independent judgment with respect to Old Colony but recognizing that the Commission might still adhere to the same terms (R. 11,540). Then followed the District Court's reference back to the Commission (R. 11,582), the issuance of the Commission's Sixth Supplemental Report and Order reapproving the Plan without change (R. 11,682), the entry of the District Court's Order No. 821 (R. 11,922) enlarging the record as stated in the order and reinstating the Court's earlier order (No. 734) which had approved the Plan as contained in the Commission's Fifth Supplemental Order, and the entry of the District Court's Order No. 822 (R. 11,924) confirming the Plan so approved. The District Court included in Order No. 822 its finding—

> "that said plan is predicated upon findings by the Commission which are supported by material evidence and are in accordance with legal standards and on the basis of said findings that said plan makes adequate provision for fair and equitable treatment for the claims of the creditors in said Classes 1 [Housatonic bondholders] and 10 [Old Colony bondholders], and that the rejection by such Classes is not reasonably justified in the light of the respective rights and interests of the rejecting creditors in said

Classes and all the relevant facts herein" (Par. 11, R. 11,929).

Of the Old Colony parties, only those Old Colony bondholders represented by Petitioners appealed to the Circuit Court of Appeals, which affirmed the action of the District Court (R. 12,655).

(i) Petitioners now ask this Court to review the question whether the rejection of the Plan in 1944 by the Old Colony bondholders was not reasonably justified, in view of the decision of the Circuit Court of Appeals in January, 1945 (Question 14).

The District Court found that the rejection of the Plan by the Old Colony bondholders was not reasonably justified for valid reasons that Petitioners fail even to mention. Such a finding, the Court held, was required by consideration of the effect its failure to confirm and consummate would have upon the Old Colony bondholders. Dismissal of the proceedings as to Old Colony would probably result in an equity receivership, but the Court noted that under such circumstances it would have no power to place limitations upon Old Colony's obligations to furnish passenger service and its obligations with respect to the Boston Terminal, as the Plan provides. This would make the Old Colony less valuable. If the proceedings as to the Old Colony should not be dismissed, the only alternative seen by the District Court would be a further reference back to the Commission. The Court concluded that all that would be achieved by such action would be further delay, since there was nothing in the evidence to warrant a change in the considered judgment of the Commission as to the value of the Old Colony for reorganization purposes. In this connection the Court noted that further delay in the

reorganization would simply increase the New Haven's prior lien claim as the result of the continuing Old Colony deficits, and that this would result in a valuation of the Old Colony properties less favorable to the Old Colony bondholders. For these reasons, among others, the Court held that the Old Colony bondholders were not reasonably justified in rejecting the Plan (Stip. R. I., No. 11, pp. 11, 911-13).

The preponderance of dissent by the Old Colony bondholders was by a narrow margin hardly weighting the scale against the informed judgment of the District Court, who had lived with the case for more than a decade. As this Court held in the *Denver case* (90 L. ed. 1134), Section 77 leaves the fairness and equity of the treatment afforded each class to be finally and objectively determined by the tribunals appointed by law, namely, the Commission and the District Court. The governing standard is whether the treatment accorded the rejecting class is in the judgment of an impartial arbiter in accordance with the principles of fairness which law and justice require and is reasonably fair and justified in the light of the interests of those rejecting it.

(ii) Petitioner's contention (Question 15) that subsection (e) required a re-submission of the Plan to the Old Colony bondholders after the issuance of the Commission's Sixth Supplemental Report and Order is academic. The result of such a re-submission could only have been the same as that actually reached under the procedure followed by the District Court, since if the Plan had been re-submitted the Old Colony bondholders presumably would have again rejected it. The Circuit Court of Appeals' decision reversing the District Court's initial approval of the Plan with respect to the Old Colony at most might have increased the

size of the rejecting majority. However, if the vote falls short of the statutory requirement, it is legally immaterial whether the deficiency is large or small. In either event, the unfavorable vote brings into operation the statutory power of confirmation over the rejection if the applicable tests are met. The Plan approved by the Commission's Sixth Supplemental Report and Order was exactly the same as the Plan approved by the Commission's Fifth Supplemental Report and Order, and that Plan was submitted to the Old Colony bondholders. Nothing would have been gained, and additional delay would have been created by the procedure advocated by Petitioners. As this Court said in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939) the judicial process in bankruptcy proceedings under Section 77 is "brigaded with the administrative process of the Commission". The procedure adopted, even if technically improper, is clearly within the scope of the doctrine of *injuria absque damno* and does not give rise to any question which need be decided by this Court.

(iii) Petitioners' contention that the "cram-down" provision of subsection (e) cannot be applied to the Old Colony bondholders because they are "the only class of creditors affected by the Plan and have rejected it," is based solely upon the contention appearing throughout their petition that there is a separate and distinct plan for the Old Colony. This argument has been fully dealt with under Points I and II above.

Conclusion.

The petition should be denied.

Respectfully submitted,

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May 22, 1947.

Appendix A.

(Provisions of the Plan concerning Old Colony)

FIFTH SUPPLEMENTAL ORDER.[1]

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of February, A. D. 1944.

FINANCE DOCKET No. 10992.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY REORGANIZATION.

It appearing, That this Commission, on July 13, 1943, made and filed its fourth supplemental report and entered its supplemental order in this proceeding, approving *a modified plan*[2] for the reorganization of The New York, New Haven and Hartford Railroad Company, principal debtor, Hartford and Connecticut Western Railroad Company, hereinafter called Hartford & Connecticut Western, Old Colony Railroad Company, hereinafter called Old Colony, and Providence, Warren and Bristol Railroad Company, hereinafter called Providence, Warren & Bristol, secondary debtors;

It further appearing, That on December 21, 1943, the court having jurisdiction of this proceeding rendered an opinion construing *the plan* and indicating that certain corrections should be made therein, all of which the court stated would be incorporated in the decree to be entered thereafter approving *the plan;* and that the court further indicated in its opinion that should this Commission, on its own motion, file a supplemental report and order adopted to confirm the court's constructions and corrections, such supplemental report and order would be reflected in the court's decree;

It further appearing, That, upon consideration of the court's opinion and further consideration of the record, this

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[1] *Note:* Stip. R. I, No. 1.

[2] *Note:* All italics added, except in case of introductory, formal phrases.

Commission, upon the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon, which report (together with the previous reports of March 22, 1940, February 18 and March 25, 1941, October 6, 1942, and July 13, 1943, in this proceeding approving *a plan*) is hereby referred to and made a part hereof, in which report of even date herewith the said Commission has approved certain corrections and constructions of *the plan* upon its own motion.

It is ordered, That *the following corrected plan of reorganization* of the principal debtor, the Hartford & Connecticut Western, the Old Colony, and the Providence, Warren & Bristol be, and it is hereby, approved.

* * * * * *

B. Except as otherwise provided herein, all property of the principal debtor shall be retained by it or conveyed to a new company, as may be determined by the reorganization committee. As hereinafter used, the term "reorganized company" means the principal debtor as reorganized or the new company thus acquiring the principal debtor's property. All properties, assets, and franchises of the Hartford & Connecticut Western, the Providence, Warren & Bristol, and the Old Colony shall be conveyed and transferred to the reorganized principal debtor, except as hereinafter provided.

* * * * * *

N. The reorganized company shall acquire *as a part of its reorganization* all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

(1) (*a*) The charter of the reoganized company and of Old Colony shall be amended, and the franchises and statu-

tory obligations of the reorganized company and of Old Colony (including any charter, franchises, and statutory obligations acquired by the reorganized company in connection with the acquisition of the properties, assets, and franchises of any other railroad, and as operator of the Boston group) shall be amended or superseded so that (1) the reorganized company and Old Colony will be relieved of any obligation to continue to use the property of the Boston Terminal Company, and of any obligation to make any payments for such use if and when such use shall be discontinued; (2) the obligation of the reorganized company and Old Colony and their trustees to make payments on account of interest and principal (at maturity or otherwise, including any deficiency on foreclosure or any other claim with respect thereto) of the debt of the Boston Terminal Company represented by its at present outstanding bonds (or any extensions, renewals or refunding thereof) after the date on which the trustees have made the last payments on account of interest on said bonds, shall, so long as the reorganized company (for itself or as operator of the Boston group) shall use the property of the Boston Terminal Company, be satisfied by payment by the reorganized company of an amount per annum (and at that rate for any period of less than a year) obtained by applying to $275,000 the percentage of the total use of such property from time to time by the principal debtor (including in such percentage prior to the consummation of the plan use by its trustees for itself and as operators of Old Colony and thereafter use by itself and as operator of the Boston group); and (3) the obligation to pay operating expenses shall be limited to the amount of such expenses after deducting all revenues from rentals and concessions; provided, however, that, if the number of passengers using the South Station of the Boston Terminal Company shall substantially increase in the future, this Commission will consider an application by any bondholder of the Terminal Company to make an equitable revision of the amount payable by the reorganized company.

(*b*) The trustee in bankruptcy of the Boston Terminal Company or any receiver in equity which may hereafter be appointed by any court of competent jurisdiction to manage the property and affairs of such corporation shall have the right to elect whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Boston Terminal Company and file a proof of claim for damages in these proceedings, or will accept the terms proposed in the plan for the continued occupation and use of such property by such railroads and thereby waive all claim of damages arising from the rejection and all claims for compensation for the use of its property other than such compensation as is provided by the plan, such election to be exercised upon the submission to him by this Commission of the plan for acceptance or rejection under section 77 (e) of the Bankruptcy Act and within such time thereafter as this Commission in its order of submission shall fix; provided, however, that if such trustee or any successor-receiver shall not exercise his election by rejecting the plan within the time thus limited, and shall not file a claim for damages herein within the 2 weeks next succeeding, then such trustee, his successor-receiver, the Boston Terminal Company and its creditors and stockholders shall, each and every one of them, be barred from participating as a creditor or creditors in these proceedings, or from prosecuting any claim for damages against the estate of the using bankrupt railroads.

(*c*) In the event that on an appeal from an order of the court approving this plan, any features of the plan relating to the obligations of the principal debtor and of the Old Colony to the Boston Terminal Company shall be held to be illegal (to have been inappropriate for judicial approval), if not inconsistent with the directions of the appellate mandate the court may thereupon delete from this order (*a*) all provisions designed to modify or affect the obligations of the principal debtor to the Boston Terminal Company, or

any provisions inconsistent with the appellate opinion, and (*b*) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony or of the Boston & Providence, or both of them, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol, or, if its provisions for the acquisition of the property and assets of the Old Colony and the Boston & Providence shall not have been deleted, as a comprehensive plan to include the acquisition of such properties upon the terms of the order thus modified.

(2) (*a*) The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony shall be amended or superseded so that neither road will be under any obligation to operate passenger service on Old Colony lines. The reorganized company shall, however, undertake a contractual obligation to operate, for its own account and sole benefit, freight service on the Boston group until such time as it shall acquire the assets and franchises of that group. It shall further undertake a contractual obligation to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided below. These agreements shall take the form of a stipulation by the reorganized company before the court. The contractual obligation to operate passenger service shall terminate if legislation described below in (*c*) has not been passed prior to the end of 2 years after consummation of the plan.

(*b*) The reorganized company shall not be obligated to acquire the assets and franchises of Old Colony's Boston group along with the Old Colony's other assets upon the consummation of the plan, but shall have the right without

the payment of further consideration on its part to acquire such assets and franchises at, or at any time after, the consummation of the plan. Until such acquisition, the assets and franchises of the Boston group shall remain in Old Colony, the stock of Old Colony shall be reduced to equal in par value the net salvage value ($2,328,895) of the assets in the Boston group, and the reduced stock shall be held by one or more trustees appointed by the court for the benefit of the holders of Old Colony's bonds (including its banks) at the date of the consummation of the plan. At any time, such trustee or trustees shall, upon demand of the reorganized company, convey to it the assets and franchises of the Boston group or, at the option of the reorganized principal debtor, the reduced Old Colony stock held by them.

(*c*) The foregoing parts (*a*) and (*b*) are subject to the proviso that if the Legislature of Massachusetts shall amend the charter of the reorganized company so that it will be under no charter obligation to operate passenger service on Old Colony lines, and provide that such service shall be operated only by virtue of, and in accordance with, the agreement referred to in (*a*) above, or shall by legislation provide equivalent protection (such as that resulting from the formation of a transportation district to take over the passenger service on the Boston group), then, upon consummation of the plan, if such legislation be passed prior thereto, or upon the passage of such legislation within 2 years after the consummation of the plan, the Boston group shall be acquired by the reorganized company.

(3) (*a*) Passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for the initial critical period which shall comprise the 2 years following the consummation date or January 1, 1946, whichever shall be the later, shall be $850,000 for any 12 con-

secutive calendar months falling wholly within said initial critical period. The critical figure for any 24 consecutive calendar months, all of which shall be subsequent to the initial critical period, shall be $500,000. In the event that passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect, and if as a result thereof the reorganized principal debtor or the Old Colony shall elect to discontinue passenger service on Old Colony's lines, the Commonwealth of Massachusetts shall have the option of purchasing that portion of the Boston group lines extending from Boston to Braintree at the salvage value thereof which has been accepted for the purposes of the plan (the proportion of $2,328,895, the salvage value of the entire Boston group lines estimated in 1939, applicable to the Braintree branch), plus the depreciated amount of capital improvements made since the date of the appraisal, said option, however, to be limited to such facilities appurtenant to said Boston-Braintree segment as shall reasonably be required by the Commonwealth of Massachusetts for its passenger operation and subject to a right in the reorganized company or in the Old Colony, as the case may be, to make joint use of such of said facilities as are not reasonably required for the exclusive use of the Commonwealth of Massachusetts; provided, however, that such option shall be valid only for a period of 10 years after the consummation of the plan; and provided further that in the event the Commonwealth of Massachusetts shall exercise the option provided herein, the reorganized principal debtor and the Old Colony shall so far as possible accord to the Commonwealth the right to use the Boston Terminal Company property on the same terms and conditions as possessed by the reorganized principal debtor and the Old Colony. Full jurisdiction shall be reserved to the court to determine at the appropriate time, if future controversies should arise, what facilities are in fact reasonably needed for such passenger operation by the Commonwealth and the salvage value thereof as established by the method indicated in the

subsection of the plan, and to enter any and all appropriate orders in the premises.

(*b*) As a basis for determining whether or not the critical figure in effect at the time is being met, the reorganized company shall keep monthly figures of the amount of passenger loss on Old Colony lines. Those figures shall be based upon the application of the segregation formula as approved by this Commission and the court in this proceeding, and the further apportionment of Old Colony's revenues and expenses between passenger and freight service under the general principles of this Commission's prescribed rules for separating common revenues and expenses between passenger and freight service, modified where necessary to be consistent with the apportionments made in the segregation formula and in the light of data reasonably available for such separation. The formula for this computation is annexed hereto as exhibit A.[1] The result of such computation shall determine whether or not the critical figure has been met, unless the Department of Public Utilities of Massachusetts shall deem the Commonwealth or the public aggrieved by a proposed discontinuance of passenger service on Old Colony lines pursuant to the authority contained in the plan and claim that the computations of the reorganized company are inaccurate; in which case it may apply to the District Court for the District of Connecticut for the appointment of a master to audit such computations. The result of such audit shall in all respects be given the same effect as the report of a special master. In such case, whether or not the critical figure has been met shall be determined by the computations as the same may be modified in such proceedings.

(*c*) In the event that on appeal from an order of court approving this plan, any feature of section N (2), (*a*) to (*c*), inclusive, or of section N (3), (*a*) and (*b*) shall be held to

[1] *Note:* Not reprinted as part of this Appendix.

be illegal or inappropriate for judicial approval, if not inconsistent with the appellate mandate, the court may thereupon delete from this order (*a*) the feature or features thus disapproved and (*b*) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol or, if its provisions for the acquisition of the Old Colony shall not have been so deleted, as a more comprehensive plan to include the acquisition of the Old Colony as well, upon the terms of the order thus modified.

(4) In consideration of the transfer and conveyance to the reorganized principal debtor of (*a*) all assets, properties, and franchises of Old Colony other than those of its Boston group and (*b*) the rights set forth above relating to the Boston group, the reorganized company shall issue and deliver to Old Colony's bond holders (including its banks as holders of the bonds pledged to secure their notes) pro rata, at the same time as reorganization securities are distributed to the principal debtor's creditors, in full satisfaction of their rights with respect to such bonds and notes: $4,063,784 of new first and refunding bonds, series A, and $3,047,838 of new income bonds, series A; and the reorganized company shall also issue $857,143 of additional new first and refunding bonds, series A, and $642,857 of additional new income bonds, series A, of which the reorganized company shall deliver as aforesaid so much in principal amount, in the ratio of 32,896 of fixed interest bonds to 24,672 of income bonds, as the actual credit to Old Colony for the year 1943 shall exceed $346,000:[1] and the reorganized

[1] *Note:* Paragraphs D, F, H and I of the Order provide for the necessary adjustments in the amounts of new securities to be issued in the event the Old Colony is not reorganized "*as a part of the plan* approved herein".

company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (*a*) the reorganization expenses of Old Colony as allowed by the court within the maximum limits fixed by this Commission, (*b*) current liabilities of Old Colony incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Old Colony's secured obligations, (*c*) current liabilities and obligations of Old Colony trustees incurred during the reorganization proceeding, (*d*) any and all taxes due to the United States, the Commonwealth of Massachusetts, and/or any city, town, or other political subdivision thereof, from the Old Colony or its trustees for any taxable period prior to the date of confirmation of the plan of reorganization, without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes, and provided further, that the liability of the Old Colony for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided further, that this provision shall not be deemed to preclude either the reorganized company, the Old Colony, or its trustees, from contesting the merits of any such tax in the manner provided by law, and provided further, that with respect to taxes the funds for the payment of which are withheld by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities; provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property; and (*e*) the reorganized company shall assume and discharge

any and all other claims against the Old Colony which, as of the date of confirmation of the plan of reorganization, have been allowed by the court, excluding, however, any claims ranking junior to Old Colony's bonds.

(5) All claims against the Old Colony or its trustees held by the principal debtor or its trustees, and all claims against the principal debtor or its trustee or the Bankers Trust Company held by the Old Colony or its trustees shall be released, discharged, and canceled.

(6) Whenever any dividend or distribution is declared on the common stock of the reorganized company, (additional) funds in an amount hereinafter specified shall be set aside in a sinking fund and used for the purchase or redemption and retirement of the reorganized company's income bonds issued under the plan, and, in case all of such income bonds shall have been retired, to the purchase or redemption and retirement of its preferred stock issued under the plan. The funds to be set aside in the sinking fund shall be equal to (1) the aggregate amount of the dividend or distribution declared on the common stock, times (2) the ratio of (*a*) the amount of the lease claim of the Old Colony as finally allowed by the court (including any interest allowed) to (*b*) the aggregate amount of the allowed claims (including any allowed interest) of all other unsecured creditors exclusive of the Boston & Providence.

In the event that, as conditionally authorized elsewhere in the plan, the principal debtor is separately reorganized without provision for the reorganization of the Old Colony, and in the event the trustees of the Old Colony are successful in their suit against the Bankers Trust Company, trustee under the first and refunding mortgage of the principal debtor, arising out of the rejection of the Old Colony lease by the trustees of the principal debtor and in the event the Bankers Trust Company successfully asserts a lien for indemnity against the property subject to the first and re-

funding mortgage, the plan shall be modified so as to provide that the reorganization committee shall reserve a sufficient amount of the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage and creditors junior thereto as security for the discharge of any balance of the lien recovered by the principal debtor's trustees on account of their administrative claim against the Old Colony's estate as may be properly applicable thereto, and such amount of available cash, which, in the judgment of the reorganization committee, may appropriately be applied for this purpose without impairing or disturbing other provisions of the plan, and the cash position of the reorganized company. To the extent that the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage shall be required to satisfy this lien, appropriate adjustment, under the supervision of the court, shall be made by a redistribution of the remaining securities at the expense of creditors junior to such holders.

* * * * * *

It is further ordered, that, should the judge determine, after due notice and hearing, that the provisions of this plan in respect to the reorganization of the Old Colony are, because of opposition of other than New Haven parties or interests, such as to delay unreasonably and unnecessarily the reorganization of the principal debtor, he may, in his discretion, set such provisions aside and consider and act upon the plan for reorganization of the principal debtor and the secondary debtors other than the Old Colony.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 1368, 1369

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, PETITIONERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET AL.

INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, PETITIONERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND COURT

MEMORANDUM FOR THE RECONSTRUCTION FINANCE CORPORATION

The Reconstruction Finance Corporation (hereinafter referred to as RFC), as a holder of collaterally secured notes of The New York, New Haven and Hartford Railroad Company, is

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a respondent in this reorganization proceeding, and supported the reorganization plan in the lower courts.

In view, however, of the circumstances outlined below, the RFC's financial interest in the proceeding is no longer of sufficient substance to warrant it in taking any position with respect to the petitions for certiorari.

The Interstate Commerce Commission's original report approving a plan of reorganization for *The New York, New Haven and Hartford Railroad Company,* 239 I. C. C. 337, 459, (1940), shows RFC as the holder of $10,730,415 principal amount of the Railroad Company's notes, some of which evidenced loans made by the RFC to the Railroad Company and others evidenced loans made by the Public Works Administration and acquired from that Administration by the RFC.

On June 7, 1946, the unpaid principal balance of these notes had been reduced to $2,611,619.10, such reduction having been effected by payments of income from and proceeds derived from the liquidation of the pledged collateral. On May 15, 1947, the unpaid principal balance of these notes had been reduced to $727,432.33 by means of further payments of income from proceeds derived from the liquidation of pledged collateral.

As most of the payments in reduction of these notes have represented income rather than proceeds of pledged collateral, the remaining obliga-

tion to RFC is fully secured, irrespective of the disposition of the issues raised by the petitions for certiorari. If the past is any guide to the future it is entirely reasonable to expect that payments on account of the collateral will operate to liquidate the notes completely in the comparatively near future and prior to the consummation of the reorganization of the Railroad Company.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JAMES L. DOUGHERTY,
General Counsel.
W. MEADE FLETCHER,
Chief Railroad Counsel,
Reconstruction Finance Corporation.

MAY 1947.

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